TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted]

No. [redacted] 34

LOUIS K. LIGGETT COMPANY, APPELLANT,

vs.

THE HONORABLE THOMAS J. BALDRIGE, ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA; CHARLES C. CAMPBELL, CHARLES P. KRAMER, ET AL., ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED [redacted]

(33,125)

Without [illegible] [illegible]
things but often they do.

The state may reasonably regulate its business &
provide the [illegible] of [illegible]. Safety
& [illegible] of public is the basis. Ownership
& the [illegible] is not directly related to [illegible] the busi-
ness of [illegible] matters is different from
the [illegible] & [illegible] of [illegible]. The [illegible]
of [illegible], [illegible] or other [illegible] require
the [illegible] of [illegible] is [illegible] of [illegible]
is to be done in a [illegible] [illegible]. No [illegible]
discretion is required. It is more like a [illegible]
case of [illegible] power by others. The prohibition
[illegible] by the [illegible] or by [illegible]

(33,125)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 673

LOUIS K. LIGGETT COMPANY, APPELLANT,

vs.

THE HONORABLE THOMAS J. BALDRIGE, ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, CHARLES C. CAMPBELL, CHARLES F. KRAMER, ET AL., ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF PENNSYLVANIA

MARCH TERM, 1927

In Equity

No. 4075

LOUIS K. LIGGETT COMPANY, a Corporation, Plaintiff,

vs.

The Honorable THOMAS J. BALDRIGE, Attorney General of The Commonwealth of Pennsylvania; Charles C. Campbell, Charles F. Kramer, Lucius L. Walton, Henry W. Merritt, Walter Rothwell, and John A. H. Keith, Constituting the Pennsylvania Board of Pharmacy; the Honorable Charles Edwin Fox, District Attorney for the County of Philadelphia, Pennsylvania, and the Honorable M. H. Spicker, District Attorney for the County of Schuylkill, Pennsylvania, Defendants.

BILL OF COMPLAINT—Filed June 4, 1927

To the Honorable the Judges of the said Court:

The Louis K. Liggett Company, a corporation, brings this its bill of complaint against the Honorable Thomas J. Baldrige, Attorney General of the Commonwealth of [fol. 4] Pennsylvania; Charles C. Campbell, Charles F. Kramer, Lucius L. Walton, Henry W. Merritt, Walter Rothwell and John A. H. Keith, constituting the Pennsylvania Board of Pharmacy; the Honorable Charles Edwin Fox, District Attorney for the County of Philadelphia, Pennsylvania; and the Honorable M. H. Spicker, District Attorney for the County of Schuylkill, Pennsylvania; and thereupon complains and says:

1. The plaintiff was at all times hereinafter mentioned and still is a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts; and since March 1, 1916, has been duly registered and qualified to

carry on and has actually carried on a retail drug business in the State of Pennsylvania.

2. The defendant, Thomas J. Baldrige, is the duly appointed and qualified Attorney General of the Commonwealth of Pennsylvania; and is a citizen of the United States and a resident of the City of Harrisburg, County of Dauphin, State of Pennsylvania, and Middle District of said State.

3. The defendants, Charles C. Campbell Charles F. Kramer, Lucius L. Walton, Henry W. Merritt, Walter Rothwell and John A. H. Keith, ex officio, are the duly appointed and qualified Pennsylvania Board of Pharmacy; and are citizens of the United States.

The defendant, Charles C. Campbell, resides at 6106 Penn Avenue, Pittsburg, Allegheny County, Pennsylvania, and Western District of said State.

The defendant, Charles F. Kramer, resides at 1225 North Third Street, Harrisburg, Dauphin County, Pennsylvania; the defendant, Lucius L. Walton, resides at Fourth and Pine Streets, Williamsport, Lycoming County, Pennsylvania; the defendant, Henry W. Merritt, resides at Plains, Luzerne County, Pennsylvania; and the defendant, John A. H. Keith, resides at Harrisburg, Dauphin County, Pennsylvania—all of the foregoing residences being in the Middle District of the State of Pennsylvania.

[fol. 5] The defendant Walter Rothwell resides at Hatboro, Bucks County, Pennsylvania, and Eastern District of said State.

4. The defendant, Charles Edwin Fox, is the duly elected and qualified District Attorney for the City and County of Philadelphia, State of Pennsylvania; and is a citizen of the United States and a resident of the aforesaid City and County, and Eastern District of said State.

5. The defendant, M. H. Spicker, is the duly elected and qualified District Attorney for the County of Schuylkill, State of Pennsylvania; and is a citizen of the United States and a resident of the City of Pottsville, County of Schuylkill, State of Pennsylvania, and Eastern District of said State.

6. The matter in controversy in this case, exclusive of interest and costs, exceeds the sum or value of $3,000.00.

7. The retail drug business of the plaintiff within the State of Pennsylvania was prior to the passage of the Supplement of May 13, 1927 (Exhibit A hereof), and still is carried on at twenty-eight retail drug stores owned by it, upon premises leased by it at the following respective addresses:

1541 Chestnut St., Philadelphia, Penna.
14 So. 52nd St., Philadelphia, Penna.
3701 Germantown Ave., Philadelphia, Penna.
839 Market St., Philadelphia, Penna.
300 So. Broad St., Philadelphia, Penna.
4662 Frankford Ave., Philadelphia, Penna.
1210 Market St., Philadelphia, Penna.
19 So. 60th St. Philadelphia, Penna.
1341 West Columbia Ave., Philadelphia, Penna.
4401 Frankford Ave. Philadelphia, Penna.
16th and Market Sts., Philadelphia, Penna.
144-6 So. 52nd St., Philadelphia. Penna.
[fol. 6] 4100 Lancaster Ave., Philadelphia, Penna.
1331 Chestnut St., Philadelphia, Penna.
5700 Germantown Ave., Philadelphia, Penna.
2354 No. Front St., Kensington, Philadelphia, Penna.
500 Market St., Chester, Penna.
404 Northampton St., Easton, Penna.
31-33 No. Queens St., Lancaster, Penna.
4 West Market St., York, Penna.
601 Penn Street, Reading, Penna.
25 So. Main St., Wilkes-Barre, Penna.
357 Pine St., Williamsport, Penna.
1116 11th St., Altoona, Penna.
424 Main Street, Johnstown, Penna.
1 No. Main St., Chambersburg, Penna.
355 Fifth Ave., Pittsburgh, Penna.
802-4 State Street, Erie, Penna.

8. The above enumerated retail drug stores owned by the plaintiff were prior to the passage of the Supplement of May 13, 1927 (Exhibit A), and still are under the management and personal supervision of pharmacists duly registered as such under the act of the Pennsylvania Legislature of May 17, 1917, P. L. 208—each of said pharmacists having personal supervision of not more than one of said stores—; and also each of said retail drug

stores owned by the plaintiff was prior to the passage of the said Supplement of May 13, 1927, and still is duly registered with and has a permit issued by the Pennsylvania Board of Pharmacy under the Supplemental Act of the Pennsylvania Legislature of May 26, 1921, P. L. 1172.

9. On the 13th day of May, 1927, the Governor of the Commonwealth of Pennsylvania approved a further Supplement to the Act of May 17, 1917, enacted by the General Assembly of said Commonwealth, a full, true and correct copy of which Supplement is attached to and made a part of this bill of complaint, marked "Exhibit A."

[fol. 7] 10. Prior to the passage of said Supplement, the plaintiff by an indenture of lease, dated February 20, 1926, leased from one Harry E. Kerstine the premises 901-03 Market Street, Philadelphia, Pennsylvania, for a term of twenty-one years, beginning July 15, 1927, and ending July 14, 1948, and for the purpose of owning and carrying on, inter alia, a retail drug store on the demised premises. A full, true and correct copy of said indenture of lease is attached to and made a part of this bill of complaint, marked "Exhibit B."

11. The plaintiff intended at the time it entered into the above mentioned lease and still intends to own and carry on a retail drug business on the said demised premises under the title "Pharmacy" or "Drug Store" and through registered pharmacists in its employ in accordance with the aforesaid Act of May 17, 1917, and Supplemental Act of May 25, 1921, said business including the compounding, dispensing, preparation and sale at retail of drugs, medicines and poisons other than proprietary medicines and commonly used household drugs.

12. Prior to the passage of said Supplement, the plaintiff by an indenture of lease, dated May 11, 1927, leased from one William S. Cowen the premises 13 South Center Street, Pottsville, Pennsylvania, for a term of ten years beginning May 19, 1927, and ending May 31, 1937, and for the purpose of operating, inter alia, a retail drug store on the demised premises. At the same time, the plaintiff agreed to purchase of the said William S. Cowen the retail drug

business owned and carried on by the said William S. Cowen on the said demised premises, together with all salable merchandise and stock in trade (including drugs, medicines, chemicals, toilet articles, stationery and goods and wares of every kind) and the furniture, fixtures, equipment, containers, utensils, cash registers, prescription files and records, and chattels and property of every nature and description, etc. Full, true and correct copies of said indenture of lease and agreement of sale are attached to and made a part of this bill of complaint, marked "Exhibits C and D."

[fol. 8]

13. The plaintiff intended at the time it entered into the above mentioned lease and agreement of sale and still intends to own and carry on a retail drug business on the said demised premises under the title "Pharmacy" or "Drug Store" and through registered pharmacists in its employ in accordance with the aforesaid Act of May 17, 1917, and Supplemental Act of May 26, 1921, said business including the compounding, dispensing, preparation and sale at retail of drugs, medicines and poisons other than proprietary medicines and commonly used household drugs.

14. In addition to the aforesaid drug stores owned by it, the plaintiff intends to lease or purchase and to establish and own other and additional pharmacies or drug stores within the State of Pennsylvania, and through registered pharmacists in its employ, and under the title "Pharmacy" or "Drug Store" to carry on its retail drug business therein, in accordance with the aforesaid Act of May 17, 1917, and Supplemental Act of May 26, 1921, said business including the compounding, dispensing, preparation and sale at retail of drugs, medicines and poisons other than proprietary medicines and commonly used household drugs.

15. The issued and outstanding capital stock of the plaintiff consists of 98,500 shares of common stock and 5 shares of preferred stock, all of the par value of $100 per share. Its Board of Directors is composed of 10 members. With the exception of John S. Alley, Vice-President, and R. H. Badanes, Secretary (who are registered pharmacists of Massachusetts), W. J. Rash, Vice-President, (a registered pharmacist of New York), F. L. Tompkins, a director (a

registered pharmacist of Rhode Island), and S. S. McCully, a preferred stockholder (a registered pharmacist of Rhode Island and Massachusetts), no person, who is a stockholder, director or officer of the plaintiff corporation, is a registered pharmacist.

[fol. 9] 16. Under Section 2 of said Supplement (Exhibit A), the ownership and carrying on of a retail drug business on the demised premises above mentioned (Exhibits B and C) and the ownership, establishment, acquisition and carrying on of additional or other retail drug businesses will constitute a misdemeanor on the plaintiff's part, because the said "Pharmacies" or "Drug Stores" are owned or will be owned by a corporation, of which all the members or partners are not registered pharmacists, although the same are to be operated and conducted by plaintiff under the management and personal supervision of registered pharmacists in its employ in accordance with the aforesaid Act of May 17, 1917, and Supplemental Act of May 26, 1921; and with respect to each of said "Pharmacies" or "Drug Stores," will subject the plaintiff to a fine of not more than $100 each day that the respective "Pharmacy" or "Drug Store" is owned contrary to the provisions of said Supplement (Exhibit A).

17. Under the terms of said Supplement, unless the plaintiff is able to obtain new leases upon the respective premises referred to in paragraph 7 of this bill of complaint, upon the expiration of the respective terms provided for in the existing leases thereof, the plaintiff will be forced to discontinue its drug business within the State of Pennsylvania and the value of such business will be practically destroyed.

18. The plaintiff is advised by its counsel, believes and therefore avers that the said Supplement (Exhibit A) is unconstitutional in that (a) it deprives the plaintiff of its property without due process of law and denies to the plaintiff the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States and (b) it impairs the obligations of the plaintiff's contracts in violation of Section 10 of Article I of the Constitution of the United States.

[fol. 10] 19. Under the terms of said Supplement (Exhibit A), it is the duty of the Attorney General of the Commonwealth of Pennsylvania and the District Attorneys of the proper counties of the State of Pennsylvania to prosecute any and all corporations violating the provisions of the said Supplement; and in the performance of that duty, the defendants Thomas J. Baldrige, Charles Edwin Fox and M. H. Spicker intend to prosecute the plaintiff if it should own or carry on a retail drug business on the demised premises in the cities of Philadelphia and Pottsville (Exhibits B and C) under the title "Pharmacy" or "Drug Store" and through registered pharmacists in its employ, said business including the compounding, dispensing, preparation and sale at retail of drugs, medicines and poisons other than proprietary medicines and commonly used household drugs, as a violation of the provisions of said Supplement.

20. Under the terms of said Supplement (Exhibit A), it is the duty of the Pennsylvania Board of Pharmacy to refuse and deny the plaintiff a license to own and carry on a retail drug business on the demised premises in the cities of Philadelphia and Pottsville (Exhibits B and C) under the title "Pharmacy" or "Drug Store" and through registered pharmacists in its employ, said business including the compounding, dispensing, preparation and sale at retail of drugs, medicines and poisons other than proprietary medicines and commonly used household drugs; and in the performance of that duty, the defendants, Charles C. Campbell, Charles F. Kramer, Lucius L. Walton, Henry W. Merritt, Walter Rothwell and John A. H. Keith, ex officio, as the Pennsylvania Board of Pharmacy, intend to refuse and deny the plaintiff a license to conduct the aforesaid retail drug businesses.

21. Under the terms of the Supplemental Act of May 26, 1921, P. L. 1172, it is the right of the Pennsylvania Board of Pharmacy to suspend or revoke the licenses heretofore issued to the plaintiff to carry on a retail drug business [fol. 11] within the State of Pennsylvania upon the conviction of the plaintiff for a second or any subsequent violation of any law of the State of Pennsylvania or of the

United States pertaining to the drug business, or for aiding or abetting in the violation of any such law; and in the performance of that right, the defendants, Charles C. Campbell, Charles F. Kramer, Lucius L. Walton, Henry W. Merritt, Walter Rothwell and John A. H. Keith, ex officio, as the Pennsylvania Board of Pharmacy, intend forthwith to suspend or revoke the licenses heretofore issued to the plaintiff for owning and carrying on pharmacies or drug stores within the State of Pennsylvania in violation of the provisions of the aforesaid Supplement of May 13, 1927 (Exhibit A).

22. The plaintiff avers that a compliance with the Supplement of May 13, 1927 (Exhibit A), by the plaintiff will destroy valuable existing contract and property rights, thereby causing immediate irreparable injury to the plaintiff's business within the State of Pennsylvania and also will seriously impair the plaintiff's business elsewhere within the United States; and further avers that a failure to comply with said Supplement (Exhibit A) will forthwith subject the plaintiff to oppressive penalties and a multiplicity of suits.

Wherefore, the plaintiff is in need of equitable relief and prays:

A. That an injunction issue, temporary until hearing and perpetual thereafter, enjoining and restraining the defendants, Thomas J. Baldrige, Charles Edwin Fox and M. H. Spicker, from prosecuting or bringing any criminal action against the plaintiff for a violation of the Supplement of May 13, 1927, because of the ownership and carrying on by the plaintiff of a retail drug business (including the compounding, dispensing, preparation and sale at retail of drugs, medicines and poisons other than proprietary medicines and commonly used household drugs) on the demised premises in the cities of Philadelphia and Pottsville (Ex- [fol. 12] hibits B and C) under the title "Pharmacy" or "Drug Store," when such "Pharmacies" or "Drug Stores" are owned by a corporation, all of the members and partners of which are not registered pharmacists; or because of the ownership and carrying on by the plaintiff of a like retail drug business on a site leased or purchased by the

plaintiff in the said counties of Philadelphia and Schuylkill, State of Pennsylvania, when such business is owned by a corporation all of the members and partners of which are not registered pharmacists.

B. That an injunction issue, temporary until hearing and perpetual thereafter, enjoining and restraining the defendants, Charles C. Campbell, Charles F. Kramer, Lucius L. Walton, Henry W. Merritt, Walter Rothwell and John A. H. Keith, ex officio, as the Pennsylvania Board of Pharmacy, from refusing and denying the plaintiff a license to own and carry on a retail drug business under the title "Pharmacy" or "Drug Store" and through registered pharmacists in its employ on the demised premises in the Cities of Philadelphia and Pottsville (Exhibits B and C) or on any other or additional premises leased or purchased by the plaintiff within the State of Pennsylvania and from suspending or revoking any licenses heretofore issued to the plaintiff to carry on a retail drug business in Pennsylvania, because such business is owned by a corporation, all of the members and partners of which are not registered pharmacists.

C. Such other and further relief as to your Honorable Court shall seem meet.

D. That a duplicate writ may issue out of and under the seal of this Honorable Court, directed to the United States Marshal of the Western District of the State of Pennsylvania for service upon the defendant Charles C. Campbell; and that a duplicate writ may issue out of and under the [fol. 13] seal of this Honorable Court, directed to the United States Marshal of the Middle District of the State of Pennsylvania for service upon the defendants, Thomas J. Baldrige, Charles F. Kramer, Lucius L. Walton, Henry W. Merritt and John A. H. Keith;—said duplicate writs therein and thereby commanding the said defendants and each of them on a certain day therein to be named and under a certain penalty to be and appear before this Honorable Court, then and there to answer all and singular the premises, and to stand to, perform and abide by any order, direction and decree which may be made against them and each of them in the premises.

And the plaintiff will ever pray, etc.

Roy M. Sterne, Owen J. Roberts, Attorneys for Plaintiff.

[fol. 14] *Duly sworn to by John S. Alley. Jurat omitted in printing.*

[fol. 15] EXHIBIT A TO COMPLAINT

A Supplement

To the act approved the seventeenth day of May one thousand nine hundred and seventeen (Pamphlet Laws two hundred and eight) entitled "An act to regulate the practice of pharmacy and sale of poisons and drugs and providing penalties for the violation thereof defining the words 'drugs' and 'poison' and providing for the appointment of a board which shall have in charge the enforcement of said law and the power to make rules and regulations for the enforcement of said law and providing for the purchase of samples of drugs for determining their quality strength and purity" regulating the ownership of pharmacies and drug stores and providing penalties.

Section 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met and it is hereby enacted by the authority of the same That every pharmacy or drug store shall be owned only by a licensed pharmacist and no corporation association or copartnership shall own a pharmacy or drug store unless all the partners or members thereof are licensed pharmacists except that any corporation organized and existing under the laws of the Commonwealth or of any other state of the United States and authorized to do business in the Commonwealth and empowered by its charter to own and conduct pharmacies or drug stores and any association or copartnership which at the time of the passage of this act still owns and conducts a registered pharmacy or pharmacies or a drug store or drug stores in the Commonwealth may continue to own and conduct the same, but no other or additional pharmacies or drug stores shall be established owned or conducted by

such corporation association or copartnership unless all the members or partners thereof are registered pharmacists but any such corporation association or copartnership which shall not continue to own at least one of the pharmacies or drug stores theretofore owned by it or ceases to be [fol. 16] actively engaged in the conduct of a pharmacy shall not be permitted thereafter to own a pharmacy or a drug store unless all of its partners or members are registered pharmacists and except that any person not a licensed pharmacist who at the time of the passage of this act owns a pharmacy or a drug store in the Commonwealth may continue to own and conduct the same but shall not establish or own any additional pharmacy or drug store or if he or she ceases to operate such pharmacy or drug store shall not thereafter own a pharmacy or drug store unless he or she be a registered pharmacist and except that the administrator executor or trustee of the estate of any deceased owner of a registered pharmacy or drug store may continue to own and conduct such pharmacy or drug store during the period necessary for the settlement of the estate Provided That nothing in this section shall be construed to prevent or affect the ownership by other than a registered pharmacist of a store or stores wherein the sale or manufacture of drugs or medicines is limited to proprietary medicines and commonly used household drugs Provided such commonly used household drugs are offered for sale or sold in packages which have been put up ready for sale to consumers by pharmacists manufacturing pharmacists wholesale grocers or wholesale druggists.

Section 2. Any person copartnership or corporation violating the provisions of this act shall be guilty of a misdemeanor and upon conviction thereof shall be sentenced to pay a fine of not more than one hundred dollars Each day any such pharmacy is owned contrary to the provisions of this act shall be considered a separate offense.

[fol. 17] EXHIBIT B TO COMPLAINT

This agreement made the 20th day of February 1926 by and between Harry E. Kerstine, of Philadelphia, Pa., (hereinafter called Landlord) of the one part, and Louis

K. Liggett Company, a corporation organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts (hereinafter called Tenant) of the other part, Witnesseth:—

1. Landlord does hereby demise and let unto the Tenant the five story building, with the ground on which the same is situate, located at the Northwest corner of Ninth and Market Streets, in the City of Philadelphia, State of Pennsylvania, and being known as and by the numbers 901-903 Market Street, said ground being bounded and described as follows:

Situate on the Northwest corner of Market Street and Ninth Street, in the Ninth Ward of the City of Philadelphia, containing in front or breadth on the said Market Street, Twenty-six feet, eight and one-half inches, and extending of that width in length or depth, along the West side of said Ninth Street, One Hundred and Twelve feet three inches, to a certain Thirteen feet Nine inches wide alley, which runs Eastward to said Ninth Street and Westward to a certain court or street, Twenty-five feet six inches wide, called Percy Street, Eighty feet distant from the said Ninth street, which extends Northward parallel thereto, to a point Seventy feet South of Filbert Street, all the foregoing dimensions being approximate only.

Together with the free and common use of said alley and court.

together with the appurtenances thereunto belonging, for the term hereinafter provided.

2. The term of this lease shall be twenty-one years beginning July 15, 1927 and ending July 14, 1948, and the Ten- [fol. 18] ant shall pay a rental of Fifty thousand ($50,000) dollars, per annum, in equal monthly instalments of $4,-166.67, on the fifteenth day of each and every month in advance, and the further rent of all sums or sums which shall be legally assessed upon or become chargeable to the said premises during the term hereof for the use of gas or electric lighting and for all taxes and water rent or other Municipal charges chargeable to said demised premises during the entire term hereof, and for the maintenance of all fire insurance and rent insurance as hereinafter provided for.

3. And it is hereby mutually covenanted and agreed by and between the Landlord and Tenant, for themselves and their respective heirs, executors, administrators, successors and assigns in the manner following, it being understood that the premises are demised under and subject to these covenants and agreements and that they are to enure and to be regarded as strict legal conditions.

4. The Tenant shall pay the rent hereby reserved on the days and times hereinbefore mentioned, and also as the same becomes payable, for all gas and electric current consumed on or in the premises during the term hereof, and pay all bills for taxes, water rents or other municipal charges chargeable to said premises as the same become due and payable, and shall produce to the Landlord if so requested receipts for taxes on or before the first day of September in each and every year during the continuance of this lease, and a failure on the part of the Tenant so to do shall be deemed a failure to pay rent in the amount specified, and the Landlord shall have the right to levy and distrain for the same in the manner and under the terms and conditions, and with all the rights incident thereto, as are provided for the recovering of unpaid rent, including the waiver of exemption and the entry of an amicable action in ejectment, any law or custom to the contrary notwithstanding, including the maintenance of additional fire in-
[fol. 19] surance and rent insurance, as hereinafter provided for. Taxes for the first and last years shall be prorated.

5. The Tenant shall keep and at the expiration of the term peaceably deliver up the premises in like good order and condition as the same are delivered to it at the beginning of the term hereof, to wit: July 15, 1927, ordinary wear and tear, alterations and improvements permitted under this lease and casualties by fire and unavoidable accident alone excepted, and shall not knowingly do or commit, nor wilfully suffer to be done or committed, any act or thing contrary to the conditions and specifications of the policy or policies of insurance on the premises.

6. The said Tenant shall have the right to assign this lease as well as the right to sub-let the premises, to United Drug Company or any subsidiary or associate, or to any

other person or corporation for any lawful business, not more detrimental to the premises than its use by Tenant in the present business of Tenant, and which will not increase the fire insurance rate or vitiate the fire insurance upon said premises; provided, however, that Tenant shall be and remain liable to pay the rent as hereinabove provided, an assignment within the meaning of this Lease being understood and intended to comprehend not only the voluntary action of the Tenant, but also every levy or sale on execution or other legal process, and every assignment or sale in bankruptcy or insolvency, or under any other compulsory procedure or order of Court.

7. And the Tenant hereby waives and relinquishes unto and in favor of the Landlord the operation of all laws which do now or hereafter may exempt any property on the demised premises, or any property in any way belonging to the Tenant, whether on the demised premises or elsewhere, from levy and sale, upon distress for the rents or sums of money hereby reserved, including any sum or sums [fol. 20] chargeable for taxes, water rents or other Municipal charges as above provided for, and fire insurance and rent insurance as hereinafter provided for, or upon an execution of any judgment obtained in an action brought for non-payment of rent or for breach of any other of the within conditions. Provided, always, that if the Tenant shall fail or omit to pay the rents or sums hereby reserved, including taxes, water rents and other charges mentioned, on the days and times when the same are made payable, or within fifteen days thereafter (and time in this case is understood and agreed to be of the essence of the contract, and not to be relieved against or shall in any other respect violate any of the conditions and covenants herein contained, then this Lease, and the terms hereby created, shall, at the Landlord's option, to be signified by a written notice of his intention so to determine the Lease, on a day therein fixed, delivered to the Tenant, or left on the premises, at least ten days previous to the day so fixed, determine and become absolutely void, without any right on the Tenant, after the date so fixed, to save the forfeiture by payment of rent due, or by other performance of conditions thus violated.

And when the Lease shall be so determined by condition broken and notice as aforesaid, and also when and as soon

as the term hereby created shall have expired, it shall be lawful for any attorney, as Attorney for the Tenant, to sign an agreement for entering in any competent court an amicable action and judgment in ejectment (without any stay of execution), against the Tenant and all persons claiming under it for the recovery by the Landlord of the possession of the hereby demised premises, for which this shall be a sufficient warrant, whereupon, if the Landlord so desires, a writ of habere facias possession may issue forthwith, without any prior writ or proceedings whatsoever, the Tenant hereby releasing and agreeing to release the Landlord from all errors and defects whatsoever in entering such action or judgment, or causing such possessory writ to be issued, or in any proceeding thereon or concerning the same, and hereby agreeing that no writ or error or [fol. 21] objection or exception shall be made or taken thereto; provided, that the Landlord shall first cause to be filed in such action an affidavit made by him or someone on his behalf, setting forth the facts necessary to authorize the entry of such judgment according to the terms of this Lease, of which facts such affidavit shall be conclusive evidence, and if a true copy of this Lease (and of the truth of the copy such affidavit shall be sufficient evidence) shall be annexed to such affidavit, it shall not be necessary to file the original as a warrant of attorney, any rule of court to the contrary notwithstanding. No such determination of this Lease, nor taking or recovering possession of the premises, shall deprive the Landlord of any remedy or action against the Tenant, for rent or for damages for the breach of any covenant herein contained; nor shall the bringing of any such action for rent or breach of covenant nor the resort to any other remedy herein provided for the recovery of rent or damages for such breach, be construed as a waiver of the right to insist upon the forfeiture and obtain possession in the manner hereinabove provided. And, provided, that the rights and liabilities herein given to or imposed upon either of the parties hereto shall extend to the heirs, executors, administrators, successors and assigns, of such party, as though they were in each case named, unless where the assigns are expressly excluded from certain rights; and Tenant covenants to pay the said rent and other charges hereinbefore mentioned, when due and hereby agrees in

consideration of the premises that in case any portion of said rent or other charges shall be collected by distress or other legal process there shall, in addition to the principal, interest and costs of the said debt, be so collected from it the sum of five per centum upon the principal of the said debt as a part of the costs thereof.

And the Tenant hereby expressly gives to and confers upon the Landlord the full right of distress for rent for all monies that shall so become due by virtue of the terms hereof, and it gives to and confers upon the Landlord in like manner all rights, privileges and incidents appertaining [fol. 22] to the right of distress for rent, either at common law or by Statutes of Pensylvania, with full power to seize and sell hereunder all goods and chattels of the Tenant, whether on the demised premises or elsewhere, and hereby, in consideration of the premises, expressly agrees that all of its goods and chattels and personal property, wherever the same may be, shall be fully liable to be seized and sold in distress for the said rent, according to said statutory provisions; and further it is hereby covenanted and agreed that if at any time during the continuance of this Lease goods and chattels or personal property shall, without the permission in writing of the Landlord, be removed from the premises either clandestinely or otherwise without leaving enough of the Tenant's property on the premises to pay at least three months' rent, by sale at public auction on the premises, then the rent for the whole term of this Lease, even if there be no rent due and unpaid at the time, shall thereupon immediately become due and payable, and be liable to be collected under the terms and provisions hereof, and the Landlord may forthwith without further warrant than is herein contained, follow, take possession of, and sell at auction on the premises or elsewhere on three days' notice, served in person or left on the premises, sufficient of such property to satisfy and pay all unpaid rent for the whole term of this Lease as last aforesaid.

8. It is further covenanted and agreed that Tenant may from time to time make such repairs, improvements, additions and alterations in or to the demised premises as Tenant may desire. Said repairs, additions, improvements and alterations to be made at Tenant's own cost and expense; and Landlord covenants and agrees, upon request

at any time, to execute and deliver to Tenant, properly executed, all applications, consents and instruments which may be necessary or required by any and all public or quasi-public authorities permitting and authorizing such repairs, improvements, additions and alterations.

[fol. 23] 9. It is further covenanted and agreed that Tenant will keep the said premises in repair and will replace any plate glass that may be broken from time to time, and upon the expiration of said term will quit and surrender the same in good state and condition, reasonable use and wear thereof, alterations and improvements permitted under this Lease, and damage by fire, casualty, and the elements, excepted; and that all alterations, additions, or improvements which may be made upon the premises except furniture, fixeures and lighting fixtures put in at the expense of Tenant or occupant, shall be and become a part of the demised premises and shall remain upon and be surrendered with the premises as a part thereof at the termination of this lease.

It is understood that Tenant will comply with all the rules, orders, and regulations of the City and State authorities and of the local Board of Fire Underwriters affecting said demised premises so far as such rules, orders and regulations are caused by Tenant, Landlord hereby covenanting that the said demised premises will be delivered to Tenant in safe condition and free from any violations, or orders or notices of violations, of any rules, orders, regulations or requirements of any public or quasi-public authorities or of any Board of Underwriters; it being understood, however, that Tenant will not be required to make any structural changes, or install fire escapes, sprinklers or other fire preventive device, unless the State or Municipal authorities shall require the same to be done.

It is agreed that Tenant will keep the sidewalk in front of said demised premises free from ice and snow.

10. And Landlord further covenants and agrees that upon the request of Tenant, Landlord will at any time, or from time to time, execute all such assents and other papers as may be necessary to enable the occupant of said premises to obtain excise or other licenses in connection

with the business of a retail druggist on the demised premises.

11. In the event that the building, or a part thereof including the demised premises, shall be condemned as un- [fol. 24] safe, the demised premises shall be repaired and restored forwith at the expense of the Tenant.

11a. In the event of the taking of the whole of said premises by reason of any condemnation or the exercise of any power of eminent domain, or like power, this Lease shall terminate; and in the event of the taking or destruction of a portion of said premises by reason of such condemnation, or the exercise of any such power of eminent domain, or like power, whereby the remainder not taken or destroyed has become useless for business purposes, Tenant shall have the option to terminate this lease on written notice to Landlord; but, if the remainder not taken or destroyed shall be useful and fit for business purposes, then the remainder of the premises shall be restored by Landlord to proper condition for use and occupancy, and the rent shall be proportionately reduced for the remainder of the term, the proportionate reduction to be agreed upon between Landlord and Tenant; and in the event of their failure to agree, the amount of such reduction shall be determined by three arbitrators, one to be chosen by Landlord, one to be chosen by Tenant, and the two arbitrators so chosen to select the third arbitrator, and the decision of a majority of said Arbitrators to be binding, final and conclusive, and without right of appeal as to both parties to this Lease.

In the event of the taking of the whole or any part of said premises, Tenant shall take proper steps, by proper proceedings, to recover for the loss of its lease or the damage caused thereto.

12. It is further covenanted and agreed that the occupant of the demised premises may display upon the premises such signs as Tenant may deem advisable.

13. Landlord covenants and agrees as a condition precedent hereto and as a part of the consideration herefor [fol. 25] not to let, use or permit to be used any adjoining buildings owned by Landlord, for the sale, display or ad-

vertising of drugs, medicines, soda, ice cream, soft drinks, candy, cigars, cigarettes, tobacco or smokers' articles, rubber goods, perfumes, toilet preparations, kodacks or kodak supplies, or any of the articles usually dealt in by Louis K. Liggett Company.

14. It is further covenanted and agreed that Landlord or Landlord's duly arthorized representative may at such reasonable times and in such reasonable manner as not to interfere with the business of the occupant thereof, enter to view the said premises. Tenant further agrees that during three months next preceding the expiration of the terms hereby granted, it will at reasonable hours permit Landlord or Landlord's agent to show the premises to persons wishing to lease or purchase same, and Landlord or Landlord's agent shall have the right to place a notice, which will not interfere with the business of the occupant thereof, on the front of said premises offering said premises "To Let" or "For Sale," and Tenant hereby agrees to permit same to remain thereon during said three months without hindrance or molestation.

15. Landlord specifically covenants and warrants that Landlord has full right to lease the demised premises for the term and in the manner herein provided, and agrees to indemnify Tenant for and against any and all loss and damage, of whatsoever kind, that may result to Tenant on account of any failure of or defect in Landlord's title or right to make and execute this lease. Landlord agrees to put Tenant in possession of said premises at the commencement of the term of this Lease.

16. Landlord further covenants and agrees that Tenant upon paying the said rent and other charges herein mentioned and performing the covenants herein contained, shall and may peaceably and quietly have, hold and enjoy said premises for the term aforesaid.

[fol. 26] 17. The covenants and agreements contained in the within lease are binding upon the parties hereto, their heirs, executors, administrators, successors and assigns legal representatives.

18. All notices under any clause, covenant, term or condition of this lease shall be served upon Tenant by mailing

the same by prepaid registered mail to the real estate department of Tenant, at its main office, No. Forty-one East Forty-second Street, New York, New York, or to any subsequent address which Tenant may designate for such purpose, and any notice to the Landlord may be served personally upon Landlord or sent by prepaid registered mail to the Landlord at the address where the last rent was paid, or any subsequent address furnished by Landlord. Date of service of a notice served by mail shall be the date on which notice is deposited in a post office of the U. S. Post Office Department.

19. Notwithstanding anything hereinbefore contained, the rental for the first twelve months of the term of this Lease shall be $41,666.66, payable in equal monthly payments of $3,472.23, on the 15th day of each and every month in advance, the first payment to be made on the 15th day of July, 1927, and for the further rent of all sum or sums which shall be legally assessed upon or become chargeable to said premises for the use of gas or electric light and for all taxes and water rent and other Municipal charges chargeable to said demised premises and for the maintenance of fire insurance and rent insurance as herein provided for; the rental for the remainder of the term of this Lease to be as in this Lease hereinbefore provided.

20. The Landlord shall not be liable for injury or damage to personal property caused by Tenants in said building or resulting from steam, gas, electricity, water, rain or snow, or from pipes, appliances, or plumping works of the same, and it is agreed that throughout the term Tenant will indemnify and save harmless Landlord for and [fol. 27] against any liability, penalties, losses, damages, expenses, causes of actions, suits, claims and judgments arising from injury during said term to persons or property due to or occasioned by any negligence, act or acts, omission or omissions, of Tenant, its employees or agents.

21. It is further understood and agreed that in the event Tenant shall erect a building costing $250,000 or more to complete, to replace the building now existing, and said building shall be erected, or substantially erected by July 15, 1943, Tenant shall have the privilege of renewing and extending this Lease for a further term of twenty-one

years from July 15, 1948, under the same terms, covenants and conditions of the within Lease; it is understood and agreed that Tenant in order to take advantage of such renewal privilege shall serve written notice upon Landlord two (2) years prior to the expiration of this Lease, which notice shall be sent by registered mail addressed to Landlord at the last address where rent was paid and upon giving of such notice by Tenant this Lease shall be and become automatically renewed and extended as therein provided. Provided, however, that Tenant shall not have the right to tear down the present building and erect a new one unless Tenant shall first have furnished to Landlord a bond with surety satisfactory to Landlord providing for the erection and completion of said new building free of all liens of any kind and of all claims and demands whatsoever.

22. It is further covenanted and agreed that Tenant shall keep the building herein demised (as well as any new building that may be erected on the premises) insured against loss by fire in a sum equal to one hundred per centum of the full sound value as shown by an appraisal furnished to Tenant by Landlord thirty days prior to the beginning of this Lease, or from time to time thereafter. The expense of such appraisal is to be borne by Landlord. Such insurance is to be carried in the name of the Landlord, it being understood that the proceeds from such insurance [fol. 28] shall be paid over immediately by Landlord to Tenant to be used by Tenant in repairing the damage caused by such fire, in case of fire. In the event that such insurance money shall be insufficient to repair such damage, the Tenant shall furnish such additional money as may be necessary to restore the premises to substantially its same condition prior to such damage by fire. It is understood by the parties hereto that Tenant shall not be compelled, at any time, to insure the building for more than such sum or sums as are procurable in reputable Insurance Companies.

It is further understood and agreed that in the event the demised premises shall be damaged by fire to an extent exceeding fifty per cent. of the insurable value of the demised premises at any time during the last two years of the term of this lease, the Tenant shall restore the prem-

ises as herein provided, but the term of this Lease, shall, at the option of the Tenant, upon written notice to the Landlord, within thirty days after such fire, be extended under the same terms and conditions as herein provided for a period of two years from and after July 15, 1948. It is further understood and agreed that a representative of Tenant shall take part in and have equal rights with Landlord in adjusting insurance loss with Insurance Companies.

In the event that the building upon the demised premises be damaged or destroyed by fire, such damage or destruction shall not relieve the Tenant of its liability to pay rent during the period that the premises remain untenantable. This contingency shall be covered by rent insurance, payable to Landlord, the premiums on which shall be paid by Tenant.

23. It is further understood and agreed that in case the mortgagee of said premises shall insist that the proceeds of any fire insurance policy upon said building shall not be used for its reparation or restoration, but must be paid to such Mortgagee, then Landlord agrees, either by mortgage upon said premises or otherwise, to provide and furnish for such reparation or restoration a sum equal to the amount of insurance so paid to such Mortgagee.

[fol. 29] It is further covenanted and agreed that this lease is subject to all present and future mortgages affecting said real property in amounts not exceeding in the aggregate, at any one time sixty per centum (60%) of the value of said property and the improvements thereon. In the event Landlord at any time fails to pay any interest due on any mortgage, and any action is brought or threatened to foreclose the same, Tenant shall have the right and privilege to pay said interest and deduct the same from any rent thereafter accruing under this lease.

25. It is understood and agreed that Tenant shall not be liable to pay any of the Landlord's income tax, excess profits tax, inheritance or estate taxes or taxes similar thereto.

26. It is also agreed that Tenant shall have the right, in Tenant's own name, or in name of Landlord but without expense to Landlord, to contest, resist or apply for a

reduction of any taxes levied or imposed on the demised premises, including the right to maintain such proceedings at law or before any taxing authority, as Tenant may deem necessary or advisable during the term of this Lease.

27. It is understood and agreed that contemporaneously with the execution and delivery of this lease deposit has been made by Tenant with Landlord of the sum of Twenty Five Thousand (25,000) Dollars, which sum shall apply as rent for the period from July 15th, 1927, until such time as the entire sum of the said Twenty Five Thousand (25,000) Dollars shall have been so applied.

28. It is agreed and understood that if the Tenant becomes bankrupt, or make an assignment for the benefit of creditors, or is sold out by Sheriff's or Marshal's sale, then the rent for the balance of term shall at once become due and payable, as if by the terms of the Lease it were all payable in advance, and shall be first paid out of the proceeds of said assignment or sale, any law, usage or custom to the contrary notwithstanding.

[fol. 30] In Witness Whereof, the said Landlord has hereunto set his hand and seal, and the said Tenant has caused its corporate seal to be hereunto affixed, duly attested, the day and year first above written.

Sealed and delivered in the presence of: Abraham Israel, Max R. Miller.

Harry E. Kerstine. Louis K. Liggett Company, by Charles McCallum, Vice-President.

Attest: D. J. Monahon, Acting Secretary. (Seal.)

State of New York,
County of New York, ss:

On the 20th day of February 1926, before me, the subscriber, a Notary Public for the State of New York, and residing in New York, personally appeared the above named Harry E. Kerstine, and acknowledged the foregoing lease to be his act and deed, and desired the same might be recorded as such.

Witness my hand and notarial seal the day and year aforesaid.

M. A. Crowe, Notary Public. (Seal.)

[fol. 31] State of New York,
County of New York, ss:

On the 20th day of February 1926, before me, the subscriber, a Notary Public in and for the State of New York, personally appeared D. J. Monahon, Acting Secretary of the said Louis K. Liggett Company, who being duly sworn according to law, says that he was personally present at the execution of the foregoing Lease and saw the common or corporate seal of the said Corporation duly affixed thereto; that the seal so affixed thereto is the common or corporate seal of the said Corporation; that the foregoing Lease was duly sealed and delivered by Charles McCallum as Vice President of the said Corporation, as and for the act and deed of the said Corporation, for the uses and purposes therein mentioned, and that the names of this deponent as Acting Secretary and of Charles McCallum as Vice President of the said Corporation, subscribed to the foregoing Lease in attestation of its due execution and delivery, are of their and each of their respective handwritings.

D. J. Monahon.

Sworn to and subscribed before me the day and year aforesaid. M. A. Crowe, Notary Public. (Seal.)

[fol. 32] Exhibit C to Complaint

By this indenture, made this 11th day of May, 1927, by and between William S. Cowen, of Pottsville, Pennsylvania, hereinafter jointly, severally and collectively called Landlord, and Louis K. Liggett Company, a corporation organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts, with offices at Forty-one East Forty-second Street, New York, New York, hereinafter called Tenant, in consideration of one dollar to each in hand paid, receipt whereof is hereby acknowledged, and in further consideration of the covenants and agreements hereinafter contained, the parties hereto do respectively covenant and agree as follows:

First. Landlord does hereby lease unto Tenant and Tenant hereby hires from Landlord the entire building, known as 13 South Center Street, Pottsville, Pennsylvania, being three stories high and with a basement, all fronting twenty-two feet (22') on South Center Street and extending back, of uniform width, eighty feet (80'), a portion of which is now occupied by Landlord and used as a drug store; also the entire parcel or parcels of land whereon said building is situated, and full right of ingress and egress to and through the alley space to the rear thereof, together with the appurtenances thereunto belonging, for the term hereinafter provided.

Second. The term of this lease shall be Ten (10) years, beginning May Nineteenth, 1927, and ending May Thirty-first, 1937, and the Tenant shall pay a rental of Nine Thousand Dollars ($9,000.00) per annum (called the base rent), plus such additional rents, if any, as may accrue and become payable in the manner hereinafter provided. Said base rent shall be payable in equal monthly instalments in advance, the first payment hereunder to be payable May 19th, 1927, for the period May 19th, 1927, to May 31st, 1927.

[fol. 33] Third. It is further covenanted and agreed that Tenant may assign this lease or underlet the whole or any part of the demised premises to United Drug Company, or any subsidiary or associate, or to any other person or corporation for any lawful purpose, provided Tenant shall be and remain liable to pay the rent as hereinabove provided.

Fourth. It is further covenanted and agreed that Tenant may from time to time make such repairs, improvements, additions and alterations in or to the demised premises as Tenant may desire, said repairs, improvements, additions and alterations, however, to be at Tenant's own cost and expense; and Landlord covenants and agrees, upon request at any time, to deliver to Tenant, properly executed, all applications, consents and instruments which may be necessary or required by any and all public or quasi-public authorities permitting and authorizing such repairs, improvements, additions and alterations.

Sixth. Landlord agrees that upon the request of Tenant, Landlord will at any time, or from time to time, deliver to Tenant, properly executed, all such assents and other papers as may be necessary to enable the occupant of said premises to obtain excise or other licenses in connection with the business of a retail druggist on the demised premises.

Seventh. It is further covenanted and agreed that in case the demised premises shall be damaged or destroyed by fire or the elements this lease shall not terminate, but the premises shall be repaired, restored or rebuilt as speedily as may be reasonably possible by and at the expense of Landlord, and, if the damage shall not be such as to render the premises untenantable, then pending repairs the rent, and all other payments by Tenant under this lease, if any, shall be justly and proportionately reduced according to the nature and extent of the injury, and in case the demised premises shall be rendered untenantable the rent and all other payments by Tenant, if any, shall cease until the premises [fol. 34] shall have been completely repaired, restored or rebuilt by Landlord as aforesaid, and at the completion of such repairs, restoration or rebuilding, rent, and other payments by Tenant, if any, shall begin again and continue throughout the remainder of the term of this lease. In the event that the building or a part thereof shall be condemned as unsafe, the demised premises shall be repaired and restored forthwith at the expense of Landlord, and a just proportion of the rent and other payments by Tenant under this lease, if any, shall be suspended and abated until the demised premises shall have been put in safe and proper condition for use and occupancy. In the event of the taking, in the exercise of the power of eminent domain, or like power, of the whole or any portion of the demised premises, rentals and all payments by and obligations of Tenant under this lease shall cease, and any unearned rent paid or other payments made in advance, if any, shall be refunded to Tenant; provided, however, that if less than the whole of the demised premises shall be taken, Tenant shall, at its option, be entitled, upon notice to Landlord, to have the remainder of the premises restored by Landlord to proper condition for use and occu-

pancy, and to an opportionment of the rent, and other payments, if any, for the balance of the term of this lease.

Eighth. It is further covenanted and agreed that the occupants of the demised premises may display upon the premises such signs as Tenant may deem advisable.

Ninth. Landlord covenants and agrees not to let, use or permit to be used any other portion of the building or buildings of which the demised premises form a part, or adjoining buildings owned or controlled by Landlord, for the sale, display, or advertising of drugs, medicines, soda, ice cream, soft drinks, candy, cigars, cigarettes, tobacco or smoker's articles, rubber goods, perfumes, toilet preparations, kodaks, kodak supplies, or any of the articles usually dealt in by Tenant.

[fol. 35] Tenth. If the rent above reserved, or any part thereof, shall be unpaid or in arrears and shall so remain for a period of thirty (30) days after receipt of notice from Landlord, it shall be lawful for Landlord to begin action for the recovery of said rent, or by summary proceedings or otherwise, to enter into and upon the said demised premises, without being liable to indictment or prosecution or damages therefor, and to remove any and all persons and property therefrom, and the same to have again, repossess and enjoy as of Landlord's first and former estate, anything in this lease to the contrary notwithstanding. In the event Tenant shall be adjudicated bankrupt or insolvent according to law, or if any assignment shall be made for the benefit of creditors, or if a receiver be appointed for Tenant in insolvency proceedings and not be discharged within sixty days, Landlord may at Landlord's option terminate this lease and eject and remove from the premises any person or persons claiming under said Tenant or otherwise, and Tenant hereby agrees that in either of the events as herein set forth, all its right under said lease shall cease and terminate.

Eleventh. It is further covenanted and agreed that Landlord, or Landlord's duly authorized representative, may at such reasonable times and in such reasonable manner as not to interfere with the business of the occupant thereof, enter to view the said premises. Tenant further

agrees that during three months next preceding the expiration of the term hereby granted, it will at reasonable hours permit Landlord or Landlord's agent to show the premises to persons wishing to lease or purchase same, and Landlord or Landlord's agent shall have the right to place a notice, which will not interfere with the business of the occupant thereof, on the front of said premises offering said premises "To Let" or "For Sale," and Tenant hereby agrees to permit same to remain thereon during said three months without hindrance or molestation.

Twelfth. It is further covenanted and agreed that Tenant will keep the interior of the ground floor and base-[fol. 36] ment of said premises in repair and will replace any plate glass that may be broken from time to time in such portion of the premises, and upon the expiration of the said term will quit and surrender the same in good state and condition, reasonable use and wear thereof, alterations and improvements permitted under this lease, and damage by fire, casualty and the elements, excepted; and that all alterations, additions, or improvements which may be made by either of the parties hereto upon the premises, except furniture, fixtures, radiators, lighting fixtures, and heating equipment put in at the expense of Tenant or occupant, shall be and become a part of the demised premises and shall remain upon and be surrendered with the premises as a part thereof at the termination of this lease. It is understood that Tenant will comply with all the rules, orders and regulations of the City and State authorities and of the local Board of Fire Underwriters affecting said demised premises so far as such rules, order and regulations are caused by Tenant, Landlord hereby covenanting that said demised premises will be delivered to Tenant free for any orders of any public or quasi-public authorities, and free from and not subject to any violations, or notices of violations of any laws, rules, orders, regulations or requirements of any Federal, State, County or Municipal Government, or any department thereof or of any public or quasi-public authorities of any Board of Underwriters; it being understood however, that Tenant will not be required to make any structural changes, or install fire escapes, sprinklers or other fire preventive device in any portion of the premises or make any alterations, repairs or improvements of any character outside

of the basement and ground floor rooms thereof. It is agreed that Tenant will keep the sidewalk in front of said demised premises free from ice and snow; and that Landlord will keep the sewer and sewer connections in thorough repair throughout the term hereof, and shall make all repairs and replacements to the demised premises and appurtenances not specifically agreed to be made by Tenant. Landlord also will paint the hallways of the said premises [fol. 37] at once and thereafter, from time to time, the upper portions of said premises as needed, in colors and designs and with quality of workmanship reasonably suitable to Tenant. If at any time it becomes reasonably necessary for Tenant, after notice to Landlord, to make any repairs, or do any painting or decorating, to any portion of the demised premises other than the interior of said basement and ground floor rooms, as aforesaid, then the Landlord will fully reimburse the Tenant for any and all expense borne in connection therewith, or, at Tenant's option, any or all of said amounts may be deducted from rents.

Thirteenth. Tenant shall have the right to own and operate a retail drug store in the ground floor and basement portion of the demised premises during the term hereof and any renewal of said term.

Fourteenth. It is further covenanted and agreed that during the thirteenth month of the leasehold term hereby created, the Tenant shall render to Landlord by mail an accounting for the purpose of determining the additional rentals (if any) for the first twelve months of the term. Such accounting shall show the total amount of all gross sales made by the drug store in said premises during the first twelve months of the term; but there shall not be considered as gross sales or included in said accounting any receipts from telephone calls, weighing machines, parcel lockers, window lettings or post office or sub-station thereof, or any receipts from merchandise returned and to which there was no actual sale. If the total of such gross sales for said twelve months period as shown in said statement, be an amount in excess of One Hundred Thirty Thousand Dollars ($130,000.00), then a sum equal to seven per centum (7%) of all of such excess will be remitted by Tenant to Landlord with the statement as additional rent

for said first twelve months of the term. Annual statements shall be rendered in like manner for each and every successive twelve months period of the term. Each such [fol. 38] statement, with the additional rent thereby shown to be due (if any), shall be sent by the Tenant to the Landlord during the month next after the annual period to which it relates.

Fifteenth. It is further covenanted and agreed that should Tenant at any time during the term of this lease desire to discontinue the operation of tenant's store in the demised premises, Tenant shall give to Landlord notice by registered mail of Tenant's desire to so discontinue the operation of said store and Landlord shall have sixty (60) days from the date of said notice in which to elect to receive back from the Tenant the demised premises and to cancel this lease as of the next succeeding December thirty-first. In the event that Landlord decides to so cancel this lease Landlord shall so notify Tenant in writing by registered mail within said sixty (60) days, and in such event this lease shall cease and become terminated and Tenant's liability to pay rent and perform the terms, conditions and covenants herein shall cease and come to an end on the next succeeding December thirty-first. In the event that Tenant shall not receive notice from Landlord within sixty (60) days from the date of Tenant's said notice of Landlord's intention so to cancel this lease, then Tenant shall thereafter have the right to sublet the whole or any portion of the demised premises for any lawful purpose and the entire rental payable thereafter shall be the sum of Nine Thousand Dollars ($9,000.00) per annum, payable in equal monthly installments in advance for the unexpired portion of the term, and the reservation of rents on a percentage basis and all terms, covenants or conditions in respect thereto shall be without force or effect as to any of said unexpired portion of the term.

Sixteenth. It is further covenanted and agreed that Tenant, for each year of the term after 1927, will pay as additional rent an amount equal to any increase in real estate taxes accruing and payable upon the demised prop- [fol. 39] erty for any such year over and above all such taxes accruing and payable for 1927, a pro rata portion to

be paid for the last fractional year of the term; but Tenant shall pey no income, excess profits, inheritance, estate or similar taxes or any sum based thereon. The Tenant shall have the right to take proceedings in the Landlord's or Tenant's name protesting against any real estate tax or taxes deemed unfair or illegal. Any such amounts shall be due upon reasonable demand from Landlord accompanied by receipted tax bills or other satisfactory proof of amounts paid.

Seventeenth. It is further covenanted and agreed that Tenant shall have the right and power to renew and extend this lease for a further term of ten (10) years from May thirty-first, 1937, under the same terms, covenants and conditions as herein stipulated. In the event Tenant desires to exercise such renewal right, Tenant, on or before the first day of December, 1936, will mail Landlord notice of its election to renew and upon the mailing of such notice, in the manner herein elsewhere provided, this lease shall be automatically renewed and extended for the period of ten (10) years, beginning June 1st, 1937, and ending May 31st, 1947, upon the rents, covenants and conditions of the original term.

Eighteenth. Acceptance by the Landlord of any of the said rent at any time after the same shall become due, after default has been made in the payment thereof, or any failure to enforce any of the rights herein reserved to the party of the first part, or any of the penalties, forfeitures or conditions herein contained, shall not in anywise be considered a waiver of the right to enforce the same at any time without any notice whatsoever, and any attempt to collect the rent by one proceeding shall not be considered as a waiver of the right to collect the same by any other proceeding, but all of the rights of the Landlord, and all forfeitures, penalties and conditions may be enforced together or successively at the option of the Landlord.

[fol. 40] Nineteenth. Tenant hereby waives the usual notice to quit, and agrees to surrender said premises at the expiration of said term, or the termination of this lease without any notice other than expressly provided herein.

And upon any proceeding instituted for the recovery of said rent, either by distress or otherwise, Tenant waives the benefit of all appraisement, stay and exemption laws, the right of inquisition on real estate, and all bankruptcy or insolvency laws now in force or hereafter passed.

Twentieth. Upon the breach of any of the covenants or agreements of this lease and failure after thirty (30) days' notice, as herein elsewhere provided, to correct the same, or upon its expiration the Prothonotary or any attorney as aforesaid is hereby authorized to confess judgment in an amicable action of ejectment against the said Tenant and in favor of the said Landlord for the premises herein described, and to direct the immediate issuing of a writ of habere facias possessionem with clause of fieri facias for costs, waiving all irregularities, without notice and without asking leave of court.

Landlord specifically covenants and warrants that Landlord has full right to lease the demised premises for the term and in the manner herein provided, and agrees to indemnify Tenant for and against any and all loss and damage, of whatsoever kind, that may result to Tenant on account of any failure of or defect in Landlord's title or right to make and execute this lease. Landlord agrees to put Tenant in possession of said premises at the commencement of the term of this lease.

Landlord further covenants and agrees that Tenant, upon paying the said rent and performing the covenants herein contained, shall and may peaceably and quietly have, hold and enjoy said premises for the term aforesaid.

The covenants and agreements contained in the within lease are binding upon the parties hereto, their heirs, executors, administrators, successors, assigns and legal representatives.

[fol. 41] All notices under any clause, covenant, term or condition of this lease shall be served upon Tenant by mailing the same by prepaid registered mail to the Real Estate Department of Tenant, at its main office, Forty-one East Forty-second Street, New York, New York, or to any subsequent address which Tenant may designate for such purpose, and any notice to the Landlord may be served personally upon Landlord or sent by prepaid registered mail

to the Landlord at the address where the last rent was paid, or any subsequent address furnished by Landlord. Date of service of a notice served by mail shall be the date on which such notice is deposited in a post office of the U. S. Post Office Department.

In Witness Whereof, the above parties have hereunto set their hands and seals, this — day of May, 1927.

William S. Cowen. Louis K. Liggett Company, by Charles McCallum, Vice-President. (L. S.)

Witness: E. Ruth Gibson, C. C. Mason, Asst. Secretary.

COMMONWEALTH OF NEW YORK,
County of New York, ss:

On the 11 day of May, A. D., 1927, before me, the subscriber, a Notary Public for New York County, New York, residing at 217 West 17th St., New York City, personally appeared William S. Cowen and in due form of law acknowledged the foregoing instrument to be his act and deed, and desired the same to be recorded as such.

Witness my hand and official seal the day and year aforesaid.

E. Ruth Gibson, Notary Public, N. Y. County, No. 97. New York County Register's No. 9016. Commission expires March 30, 1929.

[fol. 42] STATE OF NEW YORK,
County of New York, ss:

Be it remembered that on the 11 day of May, A. D. 1927, before me, E. Ruth Gibson, a Notary Public, personally came C. C. Mason who, being duly sworn according to law, doth depose and say that he was personally present and did see the common or corporate seal of the above-named Louis K. Liggett Company affixed to the foregoing instrument. That the seal so affixed is the common or corporate seal of the said Louis K. Liggett Company, and was so affixed by the authority of the said corporation as the act and deed thereof. That the above named Charles McCallum is Vice-President of the said corporation, and did sign the said instrument as such in the presence of this deponent.

That this deponent is the Asst. Secretary of the said corporation, and that the name of this deponent, above signed in attestation of the due execution of the said instrument, as of this deponent's own proper handwriting.

C. C. Mason, Asst. Secretary.

Sworn to and subscribed before me. E. Ruth Gibson, Notary Public, N. Y. County, No. 97. New York County Register's No. 9016. Commission expires March 30, 1929.

[fol. 43] EXHIBIT D TO COMPLAINT

This Agreement, made this 11th day of May, 1927, by and between William S. Cowen, of Pottsville, Pennsylvania, party of the first part, hereinafter referred to as Seller, and Louis K. Liggett Company, a Massachusetts corporation, with offices at 41 East Forty-second Street, New York City, New York, hereinafter referred to as Purchaser, Witnesseth:

Whereas, Seller owns and operates a retail drug business in the city of Pottsville, Pennsylvania, in the premises known as 13 South Center Street, and is desirous of selling to Purchaser, and Purchaser is willing to buy, the property hereinafter mentioned, upon the terms and conditions hereinafter set forth.

Now, Therefore, in consideration of the sum of One Dollar ($1.00) to each of the parties hereto in hand paid, receipt whereof is hereby acknowledged, and of the mutual covenants and agreements herein contained, it is agreed by and between the parties hereto as follows:

First. Seller agrees to sell, transfer, convey and deliver to Purchaser, and Purchaser agrees to buy and pay for, as hereinafter stated, all of the saleable merchandise and stock in trade (including drugs, medicines, chemicals, toilet articles, stationery, and goods and wares of every kind), and the furniture, fixtures, equipment, containers, utensils, cash registers, prescription files and records, and chattels and property of every nature and description contained in

the said premises of Seller, or in any stockrooms or warehouses operated or maintained by Seller, and all awnings and other fixtures, equipment and improvements of Seller attached to or connected with said premises, and all property (except as hereinafter stated) of every kind, wheresoever situate, connected with the business of Seller, including trucks, automobiles, bicycles or vehicles; together [fol. 44] with the good will of the business of Seller, and Seller's Rexall Agency or subagency.

Second. Purchaser shall, at the close of business on the 18th day of May, 1927, or as soon thereafter as may be convenient to Purchaser in the exercise of reasonable diligence, take a full and detailed inventory of the saleable merchandise and stock in trade of Seller; and upon completion of such inventory, Purchaser shall price the merchandise shown by such inventory at the same costs and by the same methods as are used by Purchaser in pricing inventories of Purchaser's own stores.

Third. The purchase price of the property hereby sold and purchased shall be Nine Thousand Dollars ($9,000.00), plus a sum equal to the total amount of the saleable merchandise shown by the inventory when taken and priced as aforesaid.

Fourth. In computing the amount of said inventory there shall not be taken into consideration any merchandise or stock in trade which is damaged or deteriorated, or which is reasonably to be deemed unsaleable from any cause, nor any labels, boxes or containers having thereon Seller's name, nor any merchandise put up or sold under the label of Seller. In case any question shall arise as to whether any particular merchandise is unsaleable merchandise, Purchaser and seller shall each appoint a representative and these representatives shall determine such question and should any difference or disagreement arise between said two representatives they shall select a competent third person and the three shall act as arbitrators and the decision of two of such arbitrators shall be final and conclusive as to whether such merchandise is unsaleable merchandise or not.

Fifth. Payment of said purchase price shall be made as follows: The sum of Nine Thousand Dollars ($9,000.00) at the beginning of taking of said inventory, and the balance on completion of pricing and ascertaining the total of said [fol. 45] inventory, which shall not be later than sixty (60) days after the date of beginning of taking thereof.

Sixth. (a) It is further understood and agreed that there is not hereby sold or conveyed any cash, securities or accounts or bills receivable of the Seller; and that the Seller shall be responsible for all bills, debts or obligations due by the said Seller, or claims or demands against him; and Purchaser does not assume and shall not be responsible or liable for any such bills, debts, obligations, claims or demands.

(b) It is further agreed and understood that there shall not be included within the sale herein provided for, any intoxicating liquors of any kind.

Seventh. The Seller agrees that the sale hereby contracted for shall be carried out and performed in accordance with the provisions of the statutes of the State of Pennsylvania governing the sale or assignment of merchandise in bulk, and that it will perform all acts and things necessary on its part to comply with such bulk sales law, and will furnish all lists of creditors, affidavits, data and information (properly certified and verified) that may be necessary, incidental or desirable in complying with such bulk sales law; and that not later than May 15, 1927, Seller will pay all his creditors in full and deliver to Purchaser, in satisfactory form, an affidavit that Seller has no creditors, the delivery of such affidavit being a condition precedent hereto.

Eighth. In the event any creditor, or any other person, firm or corporation, shall obtain from any court any process, injunction, restraining order or other decree intended to prevent or interfere with the carrying out of the provisions of this agreement, or any of them, or if such action shall have been threatened, or shall seem reasonably imminent to the Purchaser, it may, in its judgment, withhold payment of any amount due under this agreement until such order, process, injunction or decree shall have been

vacated, or until the likelihood of any proceedings by any [fol. 46] party to prevent the carrying out of the provisions of this agreement shall have been disposed of to the satisfaction of the Purchaser, but the withholding of any such payment shall not be unreasonable or for an unreasonable period. In the event any creditor shall present any bill or claim against Seller to Purchaser, or notify Purchaser thereof, Seller will immediately pay or dispose of same, and until the same is paid or disposed of, Purchaser may withhold from any payment due Seller an amount equal to the amount of such bill or claim.

Ninth. It is understood and agreed that the Seller may carry on its business and may make sales out of the stock of merchandise in the regular course of business, and not otherwise, making replacements of said stock of drugs and merchandise only in the ordinary and usual course of the conduct of the business of the Seller, until the close of business on the 18th day of May, 1927.

Tenth. The sale and transfer contemplated hereby shall be effective as of the date of beginning of taking of inventory referred to in the Second paragraph hereof, and shall apply to and cover the merchandise in said store at beginning of taking of such inventory, and the furniture, fixtures and equipment in said premises at the time of signing this contract, and/or as heretofore exhibited to Purchaser or its representatives, with all additions thereto. All of said property shall be at Seller's risk as to damage by fire or otherwise prior to delivery to Purchaser.

Eleventh. Delivery of the tangible property hereby purchased and sold shall be made to Purchaser by Seller at the time and date fixed for the beginning of taking of inventory, as hereinabove stated, and this instrument shall constitute a full and complete assignment and transfer to Purchaser of all of the property and property interests, tangible and intangible, hereby agreed to be sold and purchased, as of date and time of delivery of such tangible [fol. 47] property to Purchaser; and Seller does hereby transfer, assign, convey and set over the same unto Purchaser as of the said date and time.

Twelfth. Seller hereby covenants and warrants that it has full and complete title to all of the merchandise, furniture, fixtures, chattels, good will and other property or property interests hereby sold; that said merchandise, furniture, fixtures, chattels, good will and other property or property interests hereby conveyed are free and clear of liens or incumbrances of any kind, and shall be delivered to Purchaser free and clear of all liens, claims, charges, mortgages or incumbrances of any kind whatsoever; and Seller warrants unto Purchaser his right to sell and convey the said property interests, and does hereby covenant and agree to indemnify and hold harmless the Purchaser against any incumbrances, liens, claims, debts or demands held by or due to any creditor of the Seller.

Thirteenth. The Seller further agrees that he will execute and deliver unto the Purchaser any and all other and further instruments, contracts, deeds, assignments or bills of sale that may be required by said Purchaser, in form satisfactory to said Purchaser, assigning, conveying and transferring unto said Purchaser the saleable merchandise, furniture, and fixtures, good will and all other property or property interests hereby conveyed or agreed to be sold or conveyed.

Fifteenth. In further consideration of the payments to be made by the Purchaser, the Seller agrees that he will not directly or indirectly engage in, transact, carry on or conduct any retail drug store or drug business in the city of Pottsville, Pennsylvania, for a period of ten (10) years from and after the date of this agreement, and will not be or become connected with any such business as partner, stockholder, lender, or otherwise in said territory during said period.

[fol. 48] In Witness Whereof, the parties hereto have duly caused this instrument to be executed under their signatures and seals the day and year first above written.

William C. Cowen. (L. S.) Louis K. Liggett Company, by Charles McCallum, Vice-President.

Witness: E. Ruth Gibson. C. C. Mason, Asst. Secretary. (Seal.)

COMMONWEALTH OF NEW YORK,
County of New York, ss:

On the 11th day of May, A. D. 1927, before me, the subscriber, a Notary Public for New York County, New York, residing at 217 W. 13th St., N. Y., personally appeared William S. Cowen and in due form of law acknowledged the foregoing instrument to be his act and deed, and desired the same to be recorded as such.

Witness my hand and official seal the day and year aforesaid.

E. Ruth Gibson, Notary Public, N. Y. County, No. 97. New York County Register's No. 9016. Commission expires March 30, 1929. (Seal.)

[fol. 49] STATE OF NEW YORK,
County of New York, ss:

Be it remembered that on the 11 day of May, A. D. 1927, before me, E. Ruth Gibson, a Notary Public, personally came C. C. Mason, who, being duly sworn according to law, doth depose and say that he was personally present and did see the common or corporate seal of the above named Louis K. Liggett Company affixed to the foregoing instrument. That the seal so affixed is the common or corporate seal of the said Louis K. Liggett Company, and was so affixed by the authority of the said corporation as the act and deed thereof. That the above named Charles McCallum is Vice-President of the said corporation, and did sign the said instrument as such in the presence of this deponent. That this deponent is the Secretary of the said corporation, and that the name of this deponent, above signed in attestation of the due execution of the said instrument, is of this deponent's own proper handwriting.

C. C. Mason, Asst. Secretary.

Sworn to and subscribed before me. E. Ruth Gibson, Notary Public, N. Y. County, No. 97. New York County Register's No. 9016. Commission expires March 30, 1929. (Seal.)

[fol. 50] IN UNITED STATES DISTRICT COURT

[Title omitted]

INJUNCTION AFFIDAVIT—Filed June 10, 1927

UNITED STATES OF AMERICA,
State of New York,
County of New York, ss:

William C. Watt, being first duly sworn according to law, deposes and says:

1. That he is the Vice-President of the Louis K. Liggett Company, the plaintiff in the above-entitled action; that he is authorized to make this injunction affidavit on its be-[fol. 51] half and now so does; and that the matters herein averred, insofar as they may be within affiant's own knowledge, are true and correct, and insofar as they may be upon information and belief, affiant believes them to be true and correct.

2. The above-named plaintiff is a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts and engaged in the business of owing and carrying on a retail drug business within the several states of the United States of America. Its certificate of incorporation was granted on November 12, 1909. The plaintiff has since March 1, 1916, been duly registered and qualified to carry on and has actually carried on a retail drug business in the State of Pennsylvania.

3. The retail drug business of the plaintiff within the State of Pennsylvania was prior to the passage of the Pennsylvania Supplemental Act of May 13, 1927, and still is carried on at twenty-eight retail drug stores owned by it upon premises leased by it and situate at the respective addresses set forth in paragraph 7 of the bill of complaint filed in this cause. Said drug stores are under the management and personal supervision of pharmacists duly registered as such under the Pennsylvania Act of May 17, 1917, P. L. 298—each of said pharmacists having personal supervision of not more than one of said stories—; and are duly registered with and have permits issued by the Pennsylvania Board of Pharmacy under the Pennsylvania Sup-

plemental Act of May 26, 1921, P. L. 1172. The lease on the premises 1541 Chestnut Street, Philadelphia, Pennsylvania, will expire on August 31, 1927; the lease on premises 500 Market Street, Chester, Pennsylvania will expire on January 31, 1928; the lease on the premises 14 So. 52d St., Philadelphia, Pennsylvania, will expire on March 31, 1928; the lease on the premises 3701 Germantown Avenue, Philadelphia, Pennsylvania, will expire on June 30, 1928; the lease on the premises 839 Market Street, Philadelphia, [fol. 52] Pennsylvania, will expire on December 31, 1928; the lease on the premises 25 So. Main Street, Wilkes-Barre, Pennsylvania, will expire on March 31, 1929; the lease on the premises 300 So. Broad Street, Philadelphia, Pennsylvania, will expire on October 31, 1929; and the remaining twenty-one existing leases of the plaintiff will expire on various dates after January 1, 1930.

4. On February 20, 1926, the plaintiff leased from Harry E. Kerstine the premises 901-03 Market Street, Philadelphia, Pennsylvania, for a term of twenty-one years, beginning July 15, 1927, and ending July 14, 1948. A full true and correct copy of said indenture of lease is attached to and made a part of the bill of complaint filed in this cause, marked Exhibit B. The plaintiff intended at the time it entered into the above-mentioned lease and still intends to own and carry on a retail drug business on the said demised premises under the title "Pharmacy" or "Drug Store." Such business will include the compounding, dispensing, preparation and sale at retail of drugs, medicines and poisons other than proprietary medicines and commonly used household drugs; will be under the management and personal supervision of pharmacists duly registered as such under the Act of May 17, 1917, P. L. 208, and but for the action of the Pennsylvania Board of Pharmacy hereinafter set forth, will be registered with and licensed by the Pennsylvania Board of Pharmacy under the Supplemental Act of May 26, 1921, P. L. 1172.

5. On May 11, 1927, the plaintiff leased from William S. Cowen the premises 13 So. Center Street, Pottsville, Pennsylvania, for a term of ten years beginning May 19, 1927, and ending May 31, 1937. A full, true and correct

copy of said lease is attached to and made a part of the bill of complaint filed in this cause, marked Exhibit C. At the same time, the plaintiff agreed to purchase the retail drug business owned and carried on by the said William S. Cowen on the said demised premises together [fol. 53] with all saleable merchandise, stock in trade, etc. A full, true and correct copy of the agreement of sale is attached to and made a part of the bill of complaint filed in this cause marked Exhibit D. The plaintiff intended at the time it entered into the above-mentioned lease and agreement of sale and still intends to own and carry on a similar retail drug business on the said demised premises under the title "Pharmacy" or Drug Store." Such business will also be under the management and personal supervision of pharmacists duly registered as such under the Act of May 17, 1917, P. L. 208, and but for the action of the Pennsylvania Board of Pharmacy hereinafter set forth, will be registered with and licensed by the Pennsylvania Board of Pharmacy under the Supplemental Act of May 26, 1921, P. L., 1172.

6. The retail drug business of the plaintiff within the State of Pennsylvania has since March 1, 1916, shown a continuous and substantial growth and expansion, involving an investment of approximately $480,000; and in consonance with such growth and expansion, the plaintiff is contemplating the acquisition by purchase or lease of further sites in Pennsylvania for "Pharmacies" or "Drug Stores" to be owned and carried on by it in order to meet the growing demands of its business in that State. Such other additional "Pharmacies" or "Drug Stores" will likewise be under the mangement and personal supervision of pharmacists duly registered under the Act of May 17, 1917, P. L. 208, and but for the action of the Pennsylvania Board of Pharmacy hereinafter set forth, will be registered with and licensed by the Pennsylvania Board of Pharmacy under the Supplemental Act of May 26, 1921, P. L. 1172.

7. On May 13, 1927, the Governor of the Commonwealth of Pennsylvania approved a Supplement to the Act of May 17, 1917, which provides that no other or additional pharmacies or drug stores shall be established, owned or conducted by a corporation organized and existing under the

laws of any other state of the United States and authorized to do business in the State of Pennsylvania unless all the [fol. 54] members or partners thereof are registered pharmacists; and declares that any corporation violating the provisions hereof shall be guilty of a misdemeanor and upon conviction shall be sentenced to pay a fine of not more than $100 each day any such pharmacy or drug store is owned contrary to the provisions of this act. A full, true and correct copy of said Supplement is attached to and made a part of the bill of complaint filed in this case marked Exhibit A.

8. The capital stock of the plaintiff issued and outstanding on May 13, 1927, consists of 98,500 shares of common stock of the par value of $100 per share and 5 shares of preferred stock of $100 per share making a total of outstanding common and preferred stock of $9,850,500. The common stock is all owned by the United Drug Company, a Massachusetts corporation; and the 5 shares of preferred stock all owned by S. S. McCully, a registered pharmacist of Rhode Island and Massachusetts and a district manager for the plaintiff residing in Providence, Rhode Island.

The Board of Directors of the plaintiff consists of ten members, as follows: Louis K. Liggett, Chairman of the Board; George M. Gales, President; John S. Alley, W. C. Watt,Charles McCallum, and W. J. Rash, all of whom are Vice Presidents; L. O. Schmidt, Treasurer; B. H. Badanes, Secretary; F. L. Tompkins; and Roy M. Sterne. Of the foregoing officers and directors, John S. Alley is a registered pharmacist of Massachusetts; W. J. Rash is a registered pharmacist of New York; B. H. Badanes is a registered pharmacist of Massachusetts; and F. L. Tompkins is a registered pharmacist of Rhode Island. No other officer or director of the plaintiff is a registered pharmacist.

9. Affiant is informed by plaintiff's counsel, believes and therefore avers that under the terms of the Supplement of May 13, 1927, it will be unlawful for the plaintiff to own and carry on a retail drug business on the demised prem- [fol. 55] ises in Philadelphia and Pottsville, Pennsylvania, as mentioned in paragraphs 4 and 5 of this injunction affidavit; that it will be unlawful for the plaintiff to own and

carry on other or additional pharmacies and drug stores in Pennsylvania in order to meet the growing demands of its business in that State; and that it will be unlawful to own and carry on the twenty-eight retail drug stores now owned by it and referred to in paragraph 3 of this injunction affidavit, if new leases for such stores cannot be obtained upon the expiration of the respective terms provided for in the existing leases thereof, the first lease of which will expire on August 31, 1927.

10. A compliance with provisions of the Supplement of May 13, 1927, by the plaintiff will destroy existing property and contract rights under the leases and agreement of sale mentioned in paragraphs 4 and 5 hereof in that the plaintiff may not lawfully own and carry on a retail drug business on the demised premises; will retard all growth and expansion of the plaintiff's business in the State of Pennsylvania in that the plaintiff may not lawfully own and carry on other and additional pharmacies and drug stores; and may utterly wipe out and in effect confiscate the entire business of the plaintiff in the State of Pennsylvania with its investment of approximately $480,000 by making unlawful the continuation of that business at sites other than those now leased. The necessary effect of said Supplement will be immediate irreparable injury to the plaintiff's business within the State of Pennsylvania, which resultant injury may seriously affect and impair the retail drug business and good will of the plaintiff in the several states of the United States.

11. Under the terms of the Supplemental Act of May 26, 1921, P. L. 1172, it will be the right of the defendants Charles C. Campbell, Charles K. Kramer, Lucius L. Walton, Henry W. Merritt, Walter Rothwell and John A. H. Keith, constituting the Pennsylvania Board of Pharmacy, to sus- [fol. 56] pend or revoke the licenses issued to the plaintiff for the twenty-eight retail pharmacies or drug stores stores now owned by the plaintiff upon the plaintiff's conviction for a second or any subsequent violation of the Supplement of May 13, 1927, upon the ground that the plaintiff owns and carries on a pharmacy or drug store, when all the members or partners of the plaintiff corporation are not registered pharmacists.

12. Under the terms of the Supplement of May 13, 1927, it will be the duty of the defendants Thomas J. Baldrige, Attorney General and Charles Edwin Fox and M. H. Spicker, respective Districts Attorneys for the Counties of Philadelphia and Schuylkill, to prosecute the plaintiff as soon as the plaintiff owns and carries on pharmacies or drug stores upon the demised premises mentioned in paragraphs 4 and 5 hereof, or whenever the plaintiff owns and carries on other or additional pharmacies and drug stores in Pennsylvania, or whenever the plaintiff owns and carries on the now existing twenty-eight pharmacies and drug stores on sites other than those now leased by the plaintiff.

13. Affiant is informed by plaintiff's counsel, believes and therefore avers that the Supplement of May 13, 1927, is unconstitutional in that it deprives the plaintiff of its property without due process of law and denies to the plaintiff the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States and also in that it impairs the obligations of the plaintiff's contracts in violation of Section 10 of Article I of the Constitution of the United States.

14. Under the terms of the Supplement of May 3, 1927, it will be the duty of the defendants Charles C. Campbell, Charles F. Kramer, Lucius L. Walton, Henry W. Merritt, Walter Rothwell and John A. H. Keith, constituting the Pennsylvania Board of Pharmacy, to refuse and deny the plaintiff a license to own and carry on a retail drug business on the demised premises in the Cities of Philadelphia and Pottsville, Pennsylvania, mentioned in paragraphs 4 and 5 [fol. 57] hereof under the title "Pharmcay" or "Drug Store" because such "Pharmacy" or "Drug Store" is owned by a corporation, all the members or partners of which are not registered pharmacists.

15. Despite the unconstitutionality of the Supplement of May 13, 1927, affiant believes and therefore avers that the defendants in performance of their official duties as set forth in paragraphs 11, 12 and 14 hereof intend to prosecute the plaintiff, to deny and refuse licenses to the plaintiff and to suspend or revoke its license in the manner alleged in said paragraphs, unless this Court or some other competent court shall in the meantime declare the unconstitu-

tionality of said Supplement. The performance by the defendants of their official duties as aforesaid must necessarily subject the plaintiff to oppressive penalties and a multiplicity of criminal suits; and also must necessarily cause irreparable damage to existing property and contract rights of the plaintiff.

16. The plaintiff has at all times complied with and still intends to comply with the provisions of the Act of May 17, 1917, P. L. 208, and the Supplemental Act of May 26, 1921, P. L. 1172, in the ownership and carrying on of its retail drug business within the State of Pennsylvania; but cannot comply with the provisions of the Supplement of May 13, 1927, that all the members and partners of the plaintiff corporation shall be registered pharmacists.

All of the foregoing facts affiant avers the plaintiff expects to prove at the hearing in this cause.

William C. Watt.

Sworn to and subscribed before me, a Notary Public, this third day of June, A. D. 1927. Margaret A. Crowe, Notary Public, Queens County, No. 315. Notary Public, New York County, Clerk's No. 557. New York County Register's No. 9398. Commission expires March 30, 1929. (Seal.)

[Certificate of Court Clerk affixed.]

[fol. 58] In United States District Court

[Title omitted]

Injunction Affidavit—Filed June 10, 1927

United States of America,
State of New York,
County of New York, ss:

John S. Alley, being first duly sworn according to law, deposes and says:

1. That he is the Vice-President of the Louis K. Liggett Company, the plaintiff in the above-entitled action; that

he is authorized to make this injunction affidavit on its [fol. 59] behalf and now so does; and that the matters herein averred, insofar as they may be within affiant's own knowledge, are true and correct, and insofar as they may be upon information and belief, affiant believes them to be true and correct.

2. The above-named plaintiff is a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts and engaged in the business of owning and carrying on a retail drug business within the several states of the United States of America. Its certificate of incorporation was granted on November 12, 1909. The plaintiff has since March 1, 1916, been duly registered and qualified to carry on and has actually carried on a retail drug business in the State of Pennsylvania.

3. The retail drug business of the plaintiff within the State of Pennsylvania was prior to the passage of the Pennsylvania Supplemental Act of May 13, 1927, and still is carried on at twenty-eight retail drug stores owned by it upon premises leased by it and situate at the respective addresses set forth in paragraph 7 of the bill of complaint filed in this cause. Said drug stores are under the management and personal supervision of pharmacists duly registered as such under the Pennsylvania Act of May 17, 1917, P. L. 208—each of said pharmacists having personal supervision of not more than one of said stores—; and are duly registered with and have permits issued by the Pennsylvania Board of Pharmacy under the Pennsylvania Supplemental Act of May 26, 1921, P. L. 1172. The lease on the premises 1541 Chestnut Street, Philadelphia, Pennsylvania, will expire on August 31, 1927; the lease on premises 500 Market Street, Chester Pennsylvania, will expire on January 31, 1928; the lease on the premises 14 So. 52d St., Philadelphia, Pennsylvania, will expire on March 31, 1928; the lease on the premises 3701 Germantown Avenue, Philadelphia, Pennsylvania, will expire on June 30, 1928; the lease on the premises 839 Market Street, Philadelphia, [fol. 60] Pennsylvania, will expire on December 31, 1928; the lease on the premises 25 So. Main Street, Wilkes-Barre, Pennsylvaina, will expire on March 31, 1929; the lease on the premises 300 So. Broad Street, Philadelphia, Pennsyl-

vania, will expire on October 31, 1929; and the remaining twenty-one existing leases of the plaintiff will expire on various dates after January 1, 1930.

4. On February 20, 1926, the plaintiff leased from Harry E. Kerstine the premises 901-03 Market Street, Philadelphia, Pennsylvania, for a term of twenty-one years, beginning July 15, 1927, and ending July 14, 1948. A full, true and correct copy of said indenture of lease is attached to and made a part of the bill of complaint filed in this cause, marked Exhibit B. The plaintiff intended at the time it entered into the above-mentioned lease and still intends to own and carry on a retail drug business on the said demised premises under the title "Pharmacy" or "Drug Store." Such business will include the compounding, dispensing, preparation and sale at retail of drugs, medicines and poisons other than proprietary medicines and commonly used household drugs; will be under the management and personal supervision of pharmacists duly registered as such under the Act of May 17, 1917, P. L. 208, and but for the action of the Pennsylvania Board of Pharmacy hereinafter set forth, will be registered with an licensed by the Pennsylvania Board of Pharmacy under the Supplemental Act of May 26, 1921, P. L. 1172.

5. On May 11, 1927, the plaintiff leased from William C. Cowen the premises 13 So. Center Street, Pottsville, Pennsylvania, for a term of ten years beginning May 19, 1927, and ending May 31, 1937. A full, true and correct copy of said lease is attached to and made a part of the bill of complaint filed in this cause, marked Exhibit C. At the same time, the plaintiff agreed to purchase the retail drug business owned and carried on by the said William S. Cowen on the said demised premises together [fol. 61] with all saleable merchandise, stock in trade, etc. A full, true and correct copy of the agreement of sale is attached to and made a part of the bill of complaint filed in this cause marked Exhibit D. The plaintiff intended at the time it entered into the above-mentioned lease and agreement of sale and still intends to own and carry on a similar retail drug business on the said demised premises under the title "Pharmacy" or "Drug Store." Such business will also be under the management and personal supervi-

sion of pharmacists duly registered as such under the Act of May 17, 1917, P. L. 208, and but for the action of the Pennsylvania Board of Pharmacy hereinafter set forth, will be registered with and licensed by the Pennsylvania Board of Pharmacy under the Supplemental Act of May 26, 1921, P. L. 1172.

6. The retail drug business of the plaintiff within the State of Pennsylvania has since March 1, 1916, shown a continuous and substantial growth and expansion, involving an investment of approximately $480,000; and in consonance with such growth and expansion, the plaintiff is contemplating the acquisition by purchase or lease of further sites in Pennsylvania for "Pharmacies" or "Drug Stores" to be owned and carried on by it in order to meet the growing demands of its business in that State. Such other additional "Pharmacies" or "Drug Stores" will likewise be under the management and personal supervision of pharmacists duly registered under the Act of May 17, 1917, P. L. 208, and but for the action of the Pennsylvania Board of Pharmacy hereinafter set forth, will be registered with and licensed by the Pennsylvania Board of Pharmacy under the Supplemental Act of May 26, 1921, P. L. 1172.

7. On May 13, 1927, the Governor of the Commonwealth of Pennsylvania, approved a Supplement to the Act of May 17, 1917, which provides that no other or additional pharmacies or drug stores shall be established, owned or conducted by a corporation organized and existing under the laws of any other state of the United States and authorized to do business in the State of Pennsylvania unless [fol. 62] all the members or partners thereof are registered pharmacists; and declares that any corporation violating the provisions thereof shall be guilty of a misdemeanor and upon conviction shall be sentenced to pay a fine of not more than $100 each day any such pharmacy or drug store is owned contrary to the provisions of this act. A full, true and correct copy of said Supplement is attached to and made a part of the bill of complaint filed in this case marked Exhibit A.

8. The capital stock of the plaintiff issued and outstanding on May 13, 1927, consists of 98,500 shares of common

stock of the par value of $100 per share and 5 shares of preferred stock of $100 per share making a total of outstanding common and preferred stock of $9,850,500. The common stock is all owned by the United Drug Company, a Massachusetts corporation; and the 5 shares of preferred stock are all owned by S. S. McCully, a registered pharmacist of Rhode Island and Massachusetts and a district manager for the plaintiff residing in Providence, Rhode Island.

The Board of Directors of the plaintiff consists of ten members, as follows: Louis K. Liggett, Chairman of the Board; George M. Gales, President; John E. Alley, W. C. Watt, Charles McCallum, and W. J. Rash, all of whom are Vice Presidents; L. O. Schmidt, Treasurer; B. H. Badanes, Secretary; F. L. Tompkins; and Roy M. Sterne. Of the foregoing officers and directors, John S. Alley is a registered pharmacist of Massachusetts; W. J. Rash is a registered pharmacist of New York; B. H. Badanes is a registered pharmacist of Massachusetts; and F. L. Tompkins is a registered pharmacist of Rhode Island. No other officer or director of the plaintiff is a registered pharmacist.

9. Affiant is informed by plaintiff's counsel, believes and therefore avers that under the terms of the Supplement of May 13, 1927, it will be unlawful for the plaintiff to own and carry on a retail drug business on the demised premises [fol. 63] in Philadelphia and Pottsville, Pennsylvania, as mentioned in paragraphs 4 and 5 of this injunction affidavit; that it will be unlawful for the plaintiff to own and carry on other or additional pharmacies and drug stores in Pennsylvania in order to meet the growing demands of its business in that State; and that it will be unlawful to own and carry on the twenty-eight retail drug stores now owned by it and referred to in paragraph 3 of this injunction affidavit, if new leases for such stores cannot be obtained upon the expiration of the respective terms provided for in the existing leases thereof, the first lease of which will expire on August 31, 1927.

10. A compliance with the provisions of the Supplement of May 13, 1927, by the plaintiff will destroy existing property and contract rights under the leases and agreement of sale mentioned in paragraphs 4 and 5 hereof in that the plaintiff may not lawfully own and carry on a retail drug

business on the demised premises; will retard all growth and expansion of the plaintiff's business in the State of Pennsylvania in that the plaintiff may not lawfully own and carry on other and additional pharmacies and drug stores; and may utterly wipe out and in effect confiscate the entire business of the plaintiff in the State of Pennsylvania with its investment of approximately $480,000 by making unlawful the continuation of that business at sites other than those now leased. The necessary effect of said Supplement will be immediate irreparable injury to the plaintiff's business within the State of Pennsylvania, which resultant injury may seriously affect and impair the retail drug business and good will of the plaintiff in the several states of the United States.

11. Under the terms of the Supplemental Act of May 26, 1921, P. L. 1172, it will be the right of the defendants Charles C. Campbell, Charles K. Kramer, Lucius L. Walton, Henry W. Merritt, Walter Rothwell and John A. H. Keith, constituting the Pennsylvania Board of Pharmacy, [fol. 64] to suspend or revoke the licenses issued to the plaintiff for the twenty-eight retail pharmacies or drug stores now owned by the plaintiff upon the plaintiff's conviction for a second or any subsequent violation of the Supplement of May 13, 1927, upon the ground that the plaintiff owns and carries on a pharmacy or drug store, when all the members or partners of the plaintiff corporation are not registered pharmacists.

12. Under the terms of the Supplement of May 13, 1927, it will be the duty of the defendants Thomas J. Baldrige, Attorney General, and Charles Edwin Fox and M. H. Spicker, respective District Attorneys for the Counties of Philadelphia and Schuylkill, to prosecute the plaintiff as soon as the plaintiff owns and carries on pharmacies or drug stores upon the demised premises mentioned in paragraphs 4 and 5 hereof, or whenever the plaintiff owns and carries on other or additional pharmacies and drug stores in Pennsylvania, or whenever the plaintiff owns and carries on the now existing twenty-eight pharmacies and drug stores on sites other than those now leased by the plaintiff.

13. Affiant is informed by plaintiff's counsel, believes and therefore avers that the Supplement of May 13, 1927, is

unconstitutional in that it deprives the plaintiff of its property without due process of law and denies to the plaintiff the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States and also in that it impairs the obligations of the plaintiff's contracts in violation of Section 10 of Article 1 of the Constitution of the United States.

14. Under the terms of the Supplement of May 13, 1927, it will be the duty of the defendants Charles C. Campbell, Charles F. Kramer, Lucius L. Walton, Henry W. Merritt, Walter Rothwell and John A. H. Keith, constituting the Pennsylvania Board of Pharmacy, to refuse and deny the plaintiff a license to own and carry on a retail drug business on the demised premises in the cities of Philadelphia and Pottsville, Pennsylvania, mentioned in paragraphs 4 [fols. 65-67] adn 5 hereof under the title "Pharmacy" or "Drug Store" because such "Pharmacy" or "Drug Store" is owned by a corporation, all the members or partners of which are not registered pharmacists.

15. Despite the unconstitutionality of the Supplement of May 13, 1927, affiant believes and therefore avers that the defendants in performance of their official duties as set forth in paragraphs 11, 12 and 14 hereof intend to prosecute the plaintiff, to deny and refuse licenses to the plaintiff and to suspend or revoke its licenses in the manner alleged in said paragraphs, unless this Court or some other competent court shall in the meantime declare the unconstitutionality of said Supplement. The performance by the defendants of their official duties as aforesaid must necessarily subject the plaintiff to oppressive penalties and a multiplicity of criminal suits; and also must necessarily cause irreparable damage to existing property and contract rights of the plaintiff.

16. The plaintiff has at all times complied with and still intends to comply with the provisions of the Act of May 17, 1917, P. L. 208, and the Supplemental Act of May 26, 1921, P. L. 1172, in the ownership and carrying on of its retail drug business within the State of Pennsylvania; but cannot comply with the provisions of the Supplement of May 13, 1927, that all the members and partners of the plaintiff corporation shall be registered pharmacists.

All of the foregoing facts affiant avers the plaintiff expects to prove at the hearing in this cause.

John S. Alley.

Sworn to and subscribed before me, a Notary Public, this third day of June, A. D. 1927. Margaret A. Crowe, Notary Public Queens County, No. 315. Notary Public. New York County Clerk's No. 557. New York County Register's No. 9398. Commission expires March 30, 1929. (Seal.)

[Certificate of Court Clerk affixed.]

[fol. 68] In United States District Court

[Title omitted]

Reply Affidavit re Preliminary Injunction—Filed June 16, 1927

United States of America,
State of Pennsylvania,
County of Dauphin, ss:

Thomas J. Baldrige, being duly sworn according to law, deposes and says:

1. That he is the Attorney General of the Commonwealth of Pennsylvania, one of the defendants in the above entitled [fol. 69] action; and that the matters herein averred insofar as they are within his knowledge are true and correct and insofar as they may be upon information and belief, he believes them to be true and correct.

2. That affiant is informed and believes and therefore avers that the lease entered into by plaintiff with Harry E. Kerstine for premises 901-03 Market Street, Philadelphia (the northwest corner of 9th and Market Streets) referred to in Paragraphs 10 and 11 of the Bill of Complaint and in Paragraph 4 of the Injuction Affidavits, was entered into not for the purpose of establishing a new retail drug store or pharmacy at said location but for the purpose of trans-

ferring and moving thereto a drug store or pharmacy now owned and conducted by plaintiff at the northeast corner of 9th and Market Streets, Philadelphia.

3. That affiant is informed and believes and therefore avers that the lease entered into by plaintiff with William S. Cowen for premises 13 South Center Street, Pottsville, Pennsylvania, and the agreement of sale for the purchase by plaintiff from William S. Cowen of the drug store or pharmacy theretofore owned and conducted by William S. Cowen at said premises, both of which instruments are dated May 11, 1927, referred to in Paragraphs 12 and 13 of the Bill of Complaint and in Paragraph 5 of the Injunction Affidavits, was entered into with full knowledge by the plaintiff of the passage by the Legislature of the Commonwealth of Pennsylvania of the Supplemental Act of May 13, 1927 attached to and made a part of the Bill of Complaint and marked Exhibit "A," of the probability of the approval of said Supplemental Act by the Governor of the Commonwealth of Pennsylvania within a few days thereafter, and of the necessity of the approval or disapproval of the said Supplemental Act by the said Governor on or before May 14, 1927.

4. That no violation of any of the provisions of the Act of May 11, 1917, P. L. 208, the Supplemental Act of May 26, 1921, P. L. 1172 and the said Supplemental Act of May 13, 1927 has been brought to defendants' attention, nor have they any knowledge or information of any violation by plaintiff of any of said Acts.

[fol. 70] 5. That no application for a license to conduct a drug store or pharmacy at any place or at any location in the State of Pennsylvania under the provisions of Sections 1 and 2 of the said Supplemental Act of May 26, 1921 has been made to and has been refused since May 13, 1927 by, or is now pending before, the defendants herein constituting the Pennsylvania Board of Pharmacy.

6. That no act of plaintiff, no conviction of plaintiff for any violation of any of the said Acts of Assembly set forth in Paragraph 4 hereof, nor any other matter or thing by reason of which any license of plaintiff to conduct a drug store or pharmacy may be suspended or revoked under the

provisions of Section 3 of said Supplemental Act of May 26, 1921, has been brought to defendants' attention, nor have any knowledge or information of any such acts, convictions, matters or things whatsoever.

7. That, by reason of the facts set forth in Paragraphs 4, 5 and 6 hereof, defendants have no intention to prosecute plaintiff, to refuse or deny to it any license to conduct a drug store or pharmacy or to suspend or revoke any license to conduct a drug store or pharmacy now held by plaintiff, nor have defendants communicated to plaintiff either in writing, orally or any manner whatsoever any intention to prosecute plaintiff, to institute any criminal or civil proceedings against it, to refuse or deny any license to it, or to suspend or revoke any of its licenses, nor have defendants in any way threatened plaintiff with any such proceedings or acts.

8. That affiant is informed and believes and therefore avers that the said Supplemental Act of May 13, 1927 and the enforcement thereof, and compliance therewith by the plaintiff, will not seriously or in any way or manner affect or impair the retail drug business and good will of the plaintiff in the several States of the United States, nor result in irreparable injury to the business of the plaintiff within the State of Pennsylvania, either immediately or in the future; that said Supplemental Act in no wise affects or impairs the retail drug business of the plaintiff owned and conducted by it at the time of the approval of said Supplemental Act.

[fol. 71] 9. That said Supplemental Act of May 13, 1927 and the enforcement thereof will not affect any future business, drug stores or pharmacies of the plaintiff within the State of Pennsylvania except insofar as the terms of said Supplemental Act apply thereto.

10. That affiant is informed and believes and therefore avers that the drug or pharmacy business of the plaintiff, which is being done at the stores now owned and conducted by it, is approximately 5% of the total business being done by the plaintiff at its said stores and that it is probable and likely that the drug or pharmacy business, which will or may in the future be done by plaintiff and which may

be or become subject to the provisions of the said Supplemental Act of May 13, 1927, will not exceed approximately 5% of the total business which may or will be done at any store or stores, which may be or become subject to the provisions of said Supplemental Act.

11. That affiant believes and therefore avers that the said Supplemental Act of May 13, 1927 is constitutional; that it does not deprive the plaintiff of its property without due process of law, nor deny to the plaintiff the equal protection of the law in violation of the 14th Amendment to the Constitution of the United States; that it does not impair the obligations of the plaintiff's contracts in violation of Section 10, Article I of the Constitution of the United States; but on the contrary it is averred that the said Supplemental Act was enacted by the Legislature of the Commonwealth of Pennsylvania by virtue of the police power inherent in it to legislate for the public good, health and welfare, and that the enactment of said Supplemental Act was and is a proper exercise of legislative authority.

Thos. J. Baldrige.

Sworn to and subscribed before me this 15th day of June, A. D. 1927. Lloyd B. Shoap, Notary Public. My commission expires April 14, 1931. (Seal.)

[fol. 72] In United States District Court

[Title omitted]

Reply Affidavit re Preliminary Injunction—Filed June 16, 1927

United States of America,
State of Pennsylvania,
County of Dauphin, ss:

Charles F. Kramer, being duly sworn according to law, deposes and says:

1. That he is one of the defendants in the above entitled action and a member and Secretary of the Pennsylvania

Board of Pharmacy; that he is authorized to make this affidavit for and on behalf of said Pennsylvania Board of Pharmacy; and that the matters herein averred insofar as they are within his knowledge are true and correct and insofar as they may be upon information and belief, he believes them to be true and correct.

2. That affiant is informed and believes and therefore avers that the lease entered into by plaintiff with Harry [fol. 73] E. Kerstine for premises 901-03 Market Street, Philadelphia (the northwest corner of 9th and Market Streets) referred to in Paragraphs 10 and 11 of the Bill of Complaint and in Paragraph 4 of the Injunction Affidavits, was entered into not for the purpose of establishing a new retail drug store or pharmacy at said location but for the purpose of transferring and moving thereto a drug store or pharmacy now owned and conducted by plaintiff at the northeast corner of 9th and Market Streets, Philadelphia.

3. That affiant is informed and believes and therefore avers that the lease entered into by plaintiff with William S. Cowen for premises 13 South Center Street, Pottsville, Pennsylvania, and the agreement of sale for the purchase by plaintiff from William S. Cowen of the drug store or pharmacy theretofore owned and conducted by William S. Cowen at said premises, both of which instruments are dated May 11, 1927, referred to in Paragraphs 12 and 13 of the Bill of Complaint and in Paragraph 5 of the Injunction Affidavits, was entered into with full knowledge by the plaintiff of the passage by the Legislature of the Commonwealth of Pennsylvania of the Supplemental Act of May 13, 1927, attached to and made a part of the Bill of Complaint and marked Exhibit "A," of the probability of the approval of said Supplemental Act by the Governor of the Commonwealth of Pennsylvania within a few days thereafter and of the necessity of the approval or disapproval of the said Supplemental Act by the said Governor on or before May 14, 1927.

4. That no violation of any of the provisions of the Act of May 11, 1917, P. L. 208, the Supplemental Act of May

26, 1921, P. L. 1172 and the said Supplemental Act of May 13, 1927, has been brought to defendants' attention, nor have they any knowledge or information of any violation by plaintiff of any of said Acts.

5. That no application for a license to conduct a drug store or pharmacy at any place or at any location in the State of Pennsylvania under the provisions of Sections 1 and 2 of the said Supplemental Act of May 26, 1921 has been made to and has been refused since May 13, 1927, by, or is now pending before, the defendants herein constituting the Pennsylvania Board of Pharmacy.

[fol. 74] 6. That no act of plaintiff, no conviction of plaintiff for any violation of any of the said Acts of Assembly set forth in Paragraph 4 hereof, nor any other matter or thing by reason of which any license of plaintiff to conduct a drug store or pharmacy may be suspended or revoked under the provisions of Section 3 of said Supplemental Act of May 26, 1921, has been brought to defendants' attention, nor have they any knowledge or information of any such acts, convictions, matters or things whatsoever.

7. That, by reason of the facts set forth in Paragraphs 4, 5 and 6 hereof, defendants have no intention to prosecute plaintiff, to refuse or deny to it any license to conduct a drug store or pharmacy, or to suspend or revoke any license to conduct a drug store or pharmacy now held by plaintiff, nor have defendants communicated to plaintiff either in writing, orally or any manner whatsoever any intention to prosecure plaintiff, to institute any criminal or civil proceedings against it, to refuse or deny any license to it, or to suspend or revoke any of its licenses, nor have defendants in any way threatened plaintiff with any such proceedings or acts.

8. That affiant is informed and believes and therefore avers that the said Supplemental Act of May 13, 1927 and the enforcement thereof, and compliance therewith by the plaintiff, will not seriously or in any way or manner affect or impair the retail drug business and good will of the plaintiff in the several States of the United States, nor result in irreparable injury to the business of the plaintiff within the State of Pennsylvania, either immediately or in

the future; that said Supplemental Act in no wise affects or impairs the retail drug business of the plaintiff owned and conducted by it at the time of the approval of said Supplemental Act.

9. That said Supplemental Act of May 13, 1927 and the enforcement thereof will not affect any future business, drug stores or pharmacies of the plaintiff within the State of Pennsylvania except insofar as the terms of said Supplemental Act apply thereto.

[fol. 75] 10. That affiant is informed and believes and therefore avers that the drug or pharmacy business of the plaintiff, which is being done at the stores now owned and conducted by it, is approximately 5% of the total business being done by the plaintiff at its said stores and that it is probable and likely that the drug or pharmacy business, which will or may in the future be done by plaintiff and which may be or become subject to the provisions of the said Supplemental Act of May 13, 1927, will not exceed approximately 5% of the total business which may or will be done at any store or stores, which may be or become subject to the provisions of said Supplemental Act.

11. That affiant is informed and believes and therefore avers that the said Supplemental Act of May 13, 1927 is constitutional; that it does not deprive the plaintiff of its property without due process of law, nor deny to the plaintiff the equal protection of the law in violation of the 14th Amendment to the Constitution of the United States; that it does not impair the obligations of the plaintiff's contracts in violation of Section 10, Article I, of the Constitution of the United States; but on the contrary it is averred that the said Supplemental Act was enacted by the Legislature of the Commonwealth of Pennsylvania by virtue of the police power inherent in it to legislate for the public good, health and welfare, and that the enactment of said Supplemental Act was and is a proper exercise of legislative authority.

Charles F. Kramer.

Sworn and subscribed to before me this 15th day of June, A. D. 1927. Lloyd B. Shoap, Notary Public. My commission expires April 14, 1931. (Seal.)

[fol. 76] IN UNITED STATES DISTRICT COURT

[Title omitted]

REBUTTAL AFFIDAVIT ON BEHALF OF PLAINTIFF—Filed June 17, 1927

UNITED STATES OF AMERICA,
State of Pennsylvania,
County of Philadelphia, ss:

John S. Alley, having been duly sworn according to law, deposes and says that he has read the reply affidavits of Thomas J. Baldrige and Charles F. Kramer, filed in the above cause; that he is a vice-president of the plaintiff corporation; that he is familiar with the facts involved in this cause; that as to matters herein averred of which he has personal knowledge the same are true, and as to matters averred of which he has not personal knowledge he had information and belief upon the same and believes the same to be true.

In rebuttal of the matter set forth in paragraph 2 of the said reply affidavits, affiant avers as follows:

1. The facts set forth in said paragraphs numbered 2 are incorrect. Plaintiff now conducts a drug store in accordance with the provisions of the Acts of 1917 and 1921, referred to in the bill of complaint, at 839 Market Street, Philadelphia. The lease on said premises will not expire until December 31, 1928. The plaintiff proposes to continue to operate said drug store until the expiration of said lease, subject only to this qualification, that should plaintiff be able at some time during the year 1927 or 1928 to cancel and end said lease, it would in that case discontinue said store. The establishment of its proposed drug store at [fol. 77] 901-03 Market Street is not, however, contingent upon the expiration or cancellation of the lease at 839 Market Street. It is the present intent of the plaintiff as soon as it can obtain possession of 901-03 Market Street to establish and conduct a drug store therein. The lease which it holds for said premises 901-03 Market Street entitles it to possession July 15, 1927, and in order to occupy said store on said date, or as soon thereafter as possible, plain-

tiff must immediately make necessary arrangements to purchase and procure materials and fixtures, etc., at great expense to it. It must also let contracts for the alteration of the building for its uses, and said contracts should be let now.

2. In answer to the averments in the paragraphs numbered 3 of said reply affidavits, affiant deposes as follows: It is true that the lease entered into by the plaintiff with William S. Cowan, mentioned in the bill of complaint, was entered into, as was the purchase agreement mentioned in the bill of complaint, on May 11, 1927. It is further true, however, that said lease and agreement were only executed after months of negotiation with the said Cowan, which negotiations were begun long anterior to any knowledge or belief on the part of plaintiff, its officers or agents, that the Act of May 13, 1927, would be adopted. Plaintiff must make settlement with said Cowan and close the transaction and pay over the consideration on or before June 28, 1927, under the term of its said contract. The time for closure has been extended from May 18, to June 28 by mutual agreement with said Cowan said Cowan having refused to extend the time for closure and settlement any further. It is necessary, therefore, for plaintiff to make necessary contracts and arrangements for the fitting and opening of said store under its ownership and conduct, and great and irreparable loss will be occasioned plaintiff if it cannot do so.

3. Affiant further avers that it has been and is the full intent of plaintiff, in good faith and in an honest belief in its rights so to do, to carry out and proceed at both of the locations mentioned, to wit, 901-03 Market Street, Phila- [fol. 78] delphia, and Pottsville, Pennsylvania, the opening of such further and additional stores, as more fully described in the bill of complaint. Plaintiff, however, is threatened with grave and serious losses, forfeitures and penalties if it shall proceed as it is advised by counsel it is entitled under the law to proceed so to do, and the averments in the reply affidavits filed on behalf of defendants in paragraphs 11 of the reply affidavits clearly demonstrated by their insistence on the validity and constitutionality of the Act of May 13, 1927, that plaintiff will,

unless it desists from its aforesaid intention, be subjected to pains and penalties and serious property damage which will be irreparable, unless it desists from its intention so to open and operate said drug stores.

4. Replying to paragraphs 4, 5 and 6 of said reply affidavits, affiant avers that averments by the defendants that they now know of no violations by plaintiff to said Act of May 13, 1927, are mere averments that to this date plaintiff has not in fact opened and embarked upon the ownership of the drug stores at 901-03 Market Street, —, Pennsylvania, and Pottsville, Pennsylvania, referred to in the bill of complaint. Affiant is informed by counsel, believes and therefore avers, that prosecution under the Act of May 13, 1927, may be instituted by any private citizen of the Commonwealth of Pennsylvania under the laws of Pennsylvania, whereupon it would become the duty of certain of the defendants to carry forward such prosecution, and that the denial or granting of a license by the Pharmacy Board of Pennsylvania would in no wise affect the criminal liability and the pains and penalties prescribed by said Act of Assembly should plaintiff carry out its intention to own and conduct said two drug stores mentioned in the bill of complaint. Affiant further avers that by virtue of the provisions of the Act of May 26, 1921, should plaintiff be prosecuted and convicted of two offenses under the Act of May 13, 1917 (and each day's ownership constitutes a separate offense under said Act), it would become the right of the defendants, the Pharmacy Board of Pennsylvania, to revoke the licenses of all of plaintiff's stores in the Commonwealth of Pennsylvania. The jeopardy thus involved to the plaintiff, of forfeiture of its property rights, would run into hundreds of thousands of dollars.

[fol. 79] 5. Answering the averments of paragraphs 10 of said reply affidavits, the affiant avers as follows:

The best figures obtainable in the trade show that the business of large drug store concerns is divided amongst the various classifications of articles sold approximately as follows:

	Percentages of total business
Prescriptions	.0640
Medicines	2939
Hospitals	.0577
Fancy Goods	2224
Candy	.0603
Cigars	1427
Soda	1590
Total	100%

As a matter of fact, the gross business of plaintiff at its stores in the Commonwealth of Pennsylvania in the calendar year 1926 was $2,899,789.88. Of these gross sales the sales of the prescription department of plaintiff in its stores in Pensylvania were $163,487.40, and the gross sales of medicines, by which is meant proprietary medicines and standard formulæ, articles of medicine and household remedies, totalled $793,849.86. It is further true that the prescription business constitutes a vital part of the conduct of a drug store as the same are conducted in the United States at this time. Many members of the public will not and do not patronize a drug store which does not put up prescriptions. It is the practice of many purchasers to go to a drug store for prescriptions to purchase many other articles of hospital, sick room and household use in connection with the use of the prescription, and any attempt to conduct a store which is not in the true sense a drug store, in that it makes up and sells prescriptions, will necessarily result in a very large decrease of the business of such store. A drug store, as the same is commonly understood in the practise in the United States today, is the place where members of the public purchase prescriptions and medicines, and also other customary articles commonly carried in drug stores for sale.

John S. Alley.

Sworn to and subscribed before me this 17th day of June, 1927. Amelia H. Syren, Notary Public. (Seal.)

[fols. 80 & 81] In United States District Court

[Title omitted]

Before Wooley, Circuit Judge, Dickinson and Kirkpatrick, District Judges.

Opinion sur Motion for a Preliminary Injunction—Filed July 25, 1927

Dickinson, J.:

We see no need for the expression of any opinion by us respecting the merits of this Bill at this time. The defendants disclaim any present intention to interfere with the plaintiff. The only action which could be taken must be postponed to some act of the plaintiff which might be construed to be a violation of the provisions of the Act of Assembly, the constitutionality of which is raised. It seems to us the case is ripe for the entry of a final decree. This might be reached either on a motion to dismiss the Bill on its own averments or by a stipulation that the cause be heard as upon a final hearing on the pleadings and proofs, the supporting and answering affidavits being accepted as the proofs. This was suggested to the parties but as yet has not been acted upon. We assume the willingness of the defendants to agree that they will take no action against the plaintiff without previous notice of their intention so to do (not less than forty-eight hours) so that plaintiff may recall to our attention its motion for a preliminary injunction, leave to do which is now granted. In the meantime we hold the pending motion under advisement.

[fol. 82] In United States District Court

[Title omitted]

Supplemental Bill of Complaint—Filed August 17, 1927

To the Honorable the Judges of the said Court:

The Louis K. Liggett Company, a corporation, brings this its supplemental bill of complaint against the Honorable Thomas J. Baldrige, Attorney General of the Common-

wealth of Pennsylvania; Charles C. Campbell, Charles F. Kramer, Lucius L. Walton, Henry W. Merritt, Walter Rothwell and John A. H. Keith, constituting the Pennsylvania Board of Pharmacy; the Honorable Charles Edwin Fox, District Attorney for the County of Philadelphia, Pennsylvania; and the Honorable M. H. Spicker, District Attorney for the County of Schuylkill, Pennsylvania; and thereupon further complains and says:

1. On June 4, 1927, the plaintiff filed its original bill in the above entitled cause, averring such matters and things and praying for such relief as therein stated, reference to which original bill of complaint is now specifically made for the sole purpose that the averments and prayers thereof may be incorporated into this supplemental bill of complaint.

[fol. 83] 2. The several defendants named in the original bill of complaint were duly served and have entered their appearances; and a hearing sur motion for a preliminary injunction was had on June 17, 1927, before three judges, pursuant to Section 266 of the Judicial Code.

3. The plaintiff avers by way of this supplemental bill of complaint that, subsequent to such hearing, the plaintiff duly applied to the Pennsylvania Board of Pharmacy for a permit to conduct a registered pharmacy at 13 S. Center Street, Pottsville, Pennsylvania, under the Act of Assembly of May 26, 1921, P. L. 1172, said pharmacy having been purchased by the plaintiff from one William S. Cowen under a written agreement of sale, dated May 11, 1927, as is more fully set forth in paragraphs 12 and 13 of the original bill of complaint heretofore filed in the above entitled cause. The defendant, Charles F. Kramer, as Director, Division of Drug Store Registration, State Board of Pharmacy, acknowledged the receipt of such application on June 30, 1921, and advised the plaintiff that—"Inasmuch as your right to secure such a permit is affected by the construction of the Act of May 13, 1927, it would be necessary to hold and file your application until such time as the Board of Pharmacy has opportunity to formulate rules and regulations for putting into practice the pro-

visions of the Act just referred to. You will be notified as soon as the Board has had an opportunity to act definitely upon your application."

4. The plaintiff further avers by way of this supplemental bill of complaint that on June 28, 1927, the plaintiff settled in full with the said William S. Cowen for the said Pottsville Drug Store, immediately took possession of the same, and has since owned and carried on a retail drug business on the premises under the title of "Drug Store" or "Pharmacy," which business includes the compounding, dispensing, preparation and sale at retail of drugs, medicines and poisons, other than proprietary medicines and commonly used household drugs. Said drug store has at all times been under the management and personal supervision of duly registered pharmacists in the plaintiff's employ, but because of the Act of May 13, 1927, no permit [fols. 84 & 85] for this drug store has yet been issued by the Pennsylvania Board of Pharmacy under the Act of May 26, 1921, P. L. 1172.

5. This supplemental bill of complaint is filed under an agreement of counsel and pursuant to leave of this Court first had and obtained.

Wherefore, the plaintiff is in need of equitable relief and further prays—

(a) That an injunction issue, temporary until hearing and perpetual thereafter, enjoining and restraining the defendants, Thomas J. Baldrige and M. H. Spicker, from prosecuting or bringing any criminal action against the plaintiff for a violation of the Supplement of May 13, 1927, because of the ownership and carrying on by plaintiff of a retail drug business (including the compounding, dispensing, preparation and sale and retail of drugs, medicines and poisons other than proprietary medicines and commonly used household drugs at 13 S. Center Street, Pottsville, Pennsylvania, under the title of "Drug Store" or "Pharmacy" when such "Drug Store" or "Pharmacy" is owned by a corporation, all of the members and partners of which are not registered pharmacists.

(b) Such other and further relief as to your Honorable Court shall seem meet.

And the plaintiff will ever pray, etc.

Roy M. Stearne, Owen J. Roberts, Attorneys for Plaintiff.

Duly sworn to by —— ——. Jurat omitted in printing.

[fol. 86] In United States District Court

[Title omitted]

Answer to Bill of Complaint—Filed September 23, 1927

The answer of the Honorable Thomas J. Baldrige, Attorney General of the Commonwealth of Pennsylvania; Charles C. Campbell, Charles F. Kramer, Lucius L. Walton, Henry W. Merritt, Walter Rothwell and John A. H. Keith, Constituting the Pennsylvania Board of Pharmacy; the Honorable Charles Edwin Fox, District Attorney for the County of Philadelphia, Pennsylvania; and the Honorable M. H. Spicker, District Attorney for the County of Schuylkill, Pennsylvania, the defendants in the above entitled cause, to the bill of complaint of the plaintiff above named, or to so much or such parts thereof as the defendants are advised that it is material or necessary for them to make answer, respectfully shows to the court:

1. The defendants admit that the plaintiff was at all times mentioned in the said bill of complaint and still is a corporation organized and existing under the laws of the Commonwealth of Massachusetts; but defendants, however, have no knowledge or information, and are ignorant, of the purposes for which said corporation was organized and, if the same be material to this cause, demand proof thereof. The defendants further admit that the plaintiff since March [fol. 87] 1, 1916 has been registered and qualified to carry on its business in the State of Pennsylvania, which business was stated in the application for registration to carry on business to be the conducting of retail drug stores.

2. Admitted.

3. Admitted.

4. Admitted.

5. Admitted.

6. Admitted.

7. Admitted.

8. Admitted.

9. Admitted.

10. Admitted.

11. Admitted; the defendants aver, however, that the plaintiff intended and still intends to own and carry on upon the premises 901-03 Market Street, Philadelphia, Pennsylvania, the retail drug business which, at the time of the filing of the said bill of complaint, was owned and being conducted at 839 Market Street, Philadelphia, Pennsylvania, and that the lease entered into by plaintiff, as set forth in paragraph 10 of said bill of complaint, was entered into not for the purpose of establishing a new retail drug store or pharmacy upon the above premises 901-03 Market Street, Philadelphia, Pennsylvania, but for the purpose of transferring and moving thereto the drug store or pharmacy owned and conducted by the plaintiff at the time of the filing of said bill of complaint, at 839 Market Street, Philadelphia, Pennsylvania, being the northeast corner of Ninth and Market Streets, Philadelphia.

12. Admitted; the defendants aver, however, that the plaintiff entered in to the lease and agreement of sale referred to in paragraph 12 of said bill of complaint with full knowledge by the plaintiff of the passage by the Legislature of the Commonwealth of Pennsylvania of the Supplemental Act of May 13, 1927, referred to in paragraph 9 of the said bill of complaint, of the necessity of the approval or disapproval of the said Supplemental Act by the Governor of the Commonwealth of Pennsylvania on or before May 14, 1927, and of the probability of the approval of said Supplemental [fol. 88] Act by the said Governor within a few days after the date of the execution of said lease and agreement of sale.

13. Admitted.

14. The defendants have no information or knowledge, and are ignorant, of the intentions of the plaintiff to lease or purchase and to establish and own pharmacies or drug

stores within the State of Pennsylvania other and additional to those set forth in paragraphs 7, 10, 11, 12 and 13 of said bill of complaint and, if the same be material to this cause, demand proof thereof.

15. Admitted.

16. Defendants aver that the allegations of paragraph 16 of the said bill of complaint are conclusions of law and that they are not required to make answer thereto.

17. Defendants aver that the allegations of paragraph 17 of the said bill of complaint are conclusions of law and that they are not required to make answer thereto.

18. Defendants deny that the said supplement referred to in paragraph 9 of the said bill of complaint is unconstitutional; defendants, on the other hand, are informed and advised, believe and therefore aver that the said supplement is constitutional, that it was enacted by the Legislature of the Commonwealth of Pennsylvania by virtue of the police power inherent in it to legislate for the public good health and welfare, and that the enactment of said supplement was and is a proper exercise of legislative authority; that said supplement does not deprive the plaintiff of its property without due process of law, nor does it deny to the plaintiff the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United State, nor does it impair the obligations of the plaintiff's contracts in violation of Section 10 of Article I of the Constitution of the United States.

19. The defendants admit that, under the terms of the said supplement referred to in paragraph 9 of the said bill of complaint, it is the duty of the Attorney-General of the Commonwealth of Pennsylvania and the District Attorneys of the proper Counties of the State of Pennsylvania, to [fol. 89] prosecute any and all corporations violating the provisions of the said supplement; the defendants deny that the defendants, Thomas J. Baldrige, Charles Edwin Fox and M. H. Picker, intend to prosecute the plaintiff if it should own or carry on a retail drug business on the premises in the Cities of Philadelphia and Pottsville, Pennsylvania, as set forth in paragraph 19 of the said bill of com-

plaint, but the defendants aver that the said defendants, Thomas J. Baldrige, Charles Edwin Fox and M. H. Spicker, intend to prosecute the plaintiff only if it should own or carry on a retail drug business in violation of the terms and provisions of said supplement; and defendants further aver that they have in no way threatened the plaintiff with any prosecutions or intended prosecutions.

20. The defendants deny that under the terms of the said supplement set forth in paragraph 9 of the said bill of complaint, it is the duty of the Pennsylvania Board of Pharmacy to refuse and deny the plaintiff a license to own and carry on a retail drug business on the premises in the Cities of Philadelphia and Pottsville, as set forth in paragraph 20 of the said bill of complaint, or that the said Pennsylvania Board of Pharmacy intend to refuse and deny the plaintiff a license to conduct said retail drug business; but the defendants aver that the duty and intention of the said Pennsylvania Board of Pharmacy is to refuse and deny the plaintiff a license to conduct retail drug businesses only when said retail drug businesses will be owned and carried on in violation of the terms and provisions of said supplement; and the defendants further aver that the said Pennsylvania Board of Pharmacy has in no way threatened to refuse and deny any licenses to the plaintiff.

21. The defendants admit that under the terms of the Supplemental Act of May 26, 1921, P. L. 1172, it is the right of Pennsylvania Board of Pharmacy to suspend or revoke the licenses heretofore issued to the plaintiff to carry on a retail drug business within the State of Pennsylvania upon the conviction of the plaintiff for a second or any subsequent violation of any law of the State of Pennsylvania, or of the United States, pertaining to the drug business, or [fol. 90] for aiding in or abetting the violation of any such law; but the defendants deny that the Pennsylvania Board of Pharmacy had any intention at the time of the filing of the said bill of complaint, or intends at the present time, to suspend or revoke any licenses heretofore issued to the plaintiff for owning and carrying on pharmacies or drug stores within the State of Pennsylvania; and the defendants aver that the said Pennsylvania Board of Pharmacy has in

no way threatened to suspend or revoke any licenses issued to the plaintiff.

22. The defendants deny that the compliance by the plaintiff with the supplement set forth in paragraph 9 of the said bill of complaint will destroy valuable existing contract and property rights or will cause immediate or future irreparable injury to the plaintiff's business within the State of Pennsylvania, or will seriously impair the plaintiff's business elsewhere within the United States, or that failure to comply with said supplement will subject the plaintiff to oppressive penalties or a multiplicity of suits; but the defendants aver that a compliance by the plaintiff with the said supplement and enforcement thereof will affect the business, drug stores or pharmacies of the plaintiff within the State of Pennsylvania only in so far as the terms of said supplement apply thereto and will affect only the drug or pharmacy business of such stores as may be acquired and conducted by the plaintiff in the future; that the defendants are informed and believe and, therefore, aver that the drug or pharmacy business of the plaintiff which is being done at the stores now owned and conducted by it is approximately only five percent (5%) of the total business being done by the plaintiff at its said stores and that it is probable or likely that the drug or pharmacy business, which will or may in the future be done by the plaintiff and which may be or become subject to the provisions of the said supplement, will not exceed approximately five percent (5%) of the total business which may or will be done at any store or stores which may be or may become subject to the provisions of said supplement.

23. The defendants further allege, as a distinct and separate defense to said bill of complaint, that the plaintiff has an adequate and complete remedy against these defendants at common law.

[fol. 91] 24. The defendants further allege, as a distinct and separate defense to said bill of complaint, that this action is premature in that the said defendants have neither threatened in any way nor taken any action whatsoever to institute any criminal or civil proceedings against

the plaintiff to refuse or deny any license to it or to suspend or revoke any of its licenses.

25. The defendants further allege, as a distinct and separate defense to said bill of complaint, that the plaintiff is a foreign corporation; that the Commonwealth of Pennsylvania, through its Legislature, may prescribe the terms and conditions under which foreign corporations may qualify to engage or continue in business in said Commonwealth of Pennsylvania; and that the plaintiff has no standing in any Court to question or object to the application to it or the enforcement against it of said supplement set forth in paragraph 9 of the said bill of complaint.

Wherefore, the defendants pray that the said bill of complaint be dismissed, with costs.

Thomas J. Baldrige, Attorney General of the Commonwealth of Pennsylvania; Charles C. Campbell, Charles F. Kramer, Lucius L. Walton, Henry W. Merritt, Walter Rothwell, John A. H. Keith, Pennsylvania Board of Pharmacy; Charles Edwin Fox, District Attorney for the County of Philadelphia, Pennsylvania; M. H. Spicker, District Attorney for the County of Schuylkill, Pennsylvania, by Paul C. Wagner, Deputy Attorney General, Thomas J. Baldrige, Attorney General, Counsel for the Defendants.

[fol. 92] *Duly sworn to by Thomas J. Baldridge. Jurat omitted in printing.*

[fol. 93] In United States District Court

[Title omitted]

Answer to Supplemental Bill of Complaint—Filed September 23, 1927

The answer of the Honorable Thomas J. Baldrige, Attorney General of the Commonwealth of Pennsylvania; Charles C. Campbell, Charles F. Kramer, Lucius L. Walton, Henry W. Merritt, Walter Rothwell and John A. H. Keith, Constituting the Pennsylvania Board of Pharmacy;

the Honorable Charles Edwin Fox, District Attorney for the County of Philadelphia, Pennsylvania; and the Honorable M. H. Spicker, District Attorney for the County of Schuylkill, Pennsylvania, the defendants in the above entitled cause, to the supplemental bill of complaint of the plaintiff above named, respectfully shows to the Court:

1. The defendants admit that the plaintiff filed its original bill of complaint in the above entitled cause on June 4, 1927, and in answer to the averments and prayers thereof reference is now specifically made to the answer of the defendants to said original bill heretofore filed for the purpose that the averments and prayers in said answer contained may be incorporated into this answer as being the answer to said original bill.

[fol. 94] 2. Admitted.

3. Admitted.

4. The defendants admit that on June 28, 1927 the plaintiff settled in full with William S. Cowen for the Pottsville Drug Store, immediately took possession of the same and has since owned and carried on a retail drug business on the premises under the title of "Drug Store" or "Pharmacy," which business includes the compounding, dispensing, preparation and sale at retail of drugs, medicines and poisons, other than proprietary medicines and commonly used household drugs and that said drug store has at all times been under the management and personal supervision of duly registered pharmacists in the plaintiff's employ. The defendants deny that no permit for said drug store has yet been issued by the Pennsylvania Board of Pharmacy under the Act of May 26, 1921, P. L. 1172 because of the Act of May 13, 1927, but on the contrary the defendants aver that the reason why no permit for said drug store has yet been issued by the Pennsylvania Board of Pharmacy is that set forth in the advice sent by the defendant Charles F. Kramer, Director Division of Drug Store Registration, State Board of Pharmacy, to the plaintiff on July 30, 1927, as set forth in full in Paragraph 3 of the supplemental bill of complaint of the plaintiff.

5. Admitted.

6. Defendants further allege as distinct and separate defences to said supplemental bill of complaint all of the distinct and separate defences set forth and alleged in the answer of the defendants to the original bill of complaint in this cause.

Wherefore the defendants pray that the said supplemental bill of complaint be dismissed with costs.

Thomas J. Baldrige, Attorney General of the Commonwealth of Pennsylvania; Charles C. Campbell, Charles F. Kramer, Lucius L. Walton, Henry W. Merritt, Walter Rothwell, John A. H. Keith, Pennsylvania Board of Pharmacy; Charles Edwin Fox, [fol. 95] District Attorney for the County of Philadelphia, Pennsylvania; M. H. Spicker, District Attorney for the County of Schuylkill, Pennsylvania, by Paul C. Wagner, Deputy Attorney General; Thomas J. Baldridge, Attorney General, Counsel for the Defendants.

Duly sworn to by Thomas J. Baldridge. Jurat omitted in printing.

[fol. 96] In United States District Court

[Title omitted]

Motion for a Preliminary Injunction—Filed October 31, 1927

And now, to wit, October 31, 1927, the Louis K. Liggett Company, the plaintiff above named, by its attorney, Owen J. Roberts, Esq., and pursuant to leave of Court heretofore granted, renews its motion for a preliminary injunction in the above entitled proceedings.

Owen J. Roberts, Attorney for Plaintiff.

[fol. 97] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO CERTAIN FACTS—Filed November 1, 1927

And now, to wit, November 1, 1927, it is hereby stipulated and agreed by and between counsel for the plaintiff and the defendants in the above entitled proceeding in equity that the plaintiff having on October 31, 1927 renewed its motion for a preliminary injunction, this cause may now be disposed of by the Court as upon final hearing on the pleadings and proofs, such pleadings being the original bill of complaint, the supplemental bill of complaint, and the several answers thereto heretofore filed, and such proofs being the facts admitted in the pleadings, together with the following new and additional facts which are to be admitted and accepted by the Court as part of the proofs in this proceeding, namely:

That subsequent to the hearing on June 17, 1927 sur the plaintiff's motion for a preliminary injunction, the plaintiff has duly acquired by purchase and now owns a "Pharmacy" or "Drug Store," situate at 14 Carlisle Street, Hanover, Pennsylvania, which "Pharmacy" or "Drug Store" was purchased from Jacob L. Emlet and Rena B. Emlet, Executrix of the Estate of John N. Emlet, Deceased, together with all sal-able merchandise and stock in trade (including drugs, medicines, chemicals, toilet articles, stationery and goods, and wares of every kind), prescription files and records, and chattels and property of every nature and description, etc.; that the plaintiff by an indenture of lease, dated October 11, 1927 leased the site of the said drug store in Hanover, Pennsylvania, for a term of 10 [fol. 98] years beginning October 17, 1927 and for the purpose of operating a retail drug store on the demised premises; that settlement in full for the said drug store (except as to the price of sal-able merchandise, which price is to be determined by inventory and subsequently paid on or before December 14, 1927) was made by the plaintiff on October 15, 1927, at which time the plaintiff took possession of the said drug store; that the plaintiff on October 14, 1927

duly applied to the Pennsylvania Board of Pharmacy for a permit to conduct a registered pharmacy or drug store upon the demised premises under the Act of Assembly of May 26, 1921, P. L. 1172, which pharmacy or drug store will be under the management and personal supervision of duly registered pharmacists in the plaintiffs employ, and the operation thereof will include the compounding, dispensing, preparation and sale at retail of drugs, medicines, and poisons other than proprietary medicines; and *poisons other than proprietary medicines and* commonly used household drugs; and that the purchase of the said pharmacy or drug store at Hanover, Pennsylvania, by the plaintiff and the ownership and operation of a retail drug business on the demised premises is in accordance with the averment by the plaintiff in paragraph 14 of its original bill of complaint of an intention to lease or purchase and to establish and own other and additional pharmacies or drug stores within the State of Pennsylvania (the plaintiff owning and operating 28 retail pharmacies or drug stores in Pennsylvania at the time of the filing of the original bill of complaint), and through registered pharmacists in its employ, and under the title "Pharmacy" or "Drug Store" to carry on its retail drug business therein in accordance with the Acts of May 17, 1917, P. L. 208, and May 26, 1921, P. L. 1172.

That since October 17, 1927, the plaintiff has owned and carried on a retail drug business on the demised premises in Hanover, Pennsylvania, under the title "Pharmacy" or "Drug Store" and through pharmacists in its employ and duly registered in Pennsylvania under and in accordance with the Acts of May 17, 1917 and May 26, 1921, such business including the compounding, dispensing, preparation and sale at retail of drugs, medicines, and poisons other [fol. 99] than proprietary medicines and commonly used household drugs; and that during this period, in which the plaintiff has owned and operated the aforesaid "Pharmacy" or "Drug Store," the members or partners of the plaintiff corporation have not all been registered pharmacists and are not now all registered pharmacists.

That on October 26, 1927, the Pennsylvania State Board of Pharmacy refused to grant to the plaintiff a permit for

the said "Pharmacy" of "Drug Store" at Hanover, Pennsylvania, and a copy of the letter of refusal by the Pennsylvania State Board of Pharmacy is attached to and made a part of this Stipulation of Counsel, marked Exhibit "A;" and that the Attorney General of Pennsylvania, Thomas J. Baldrige, and the District Attorney of the proper County of Pennsylvania, fully intend to and will prosecute the plaintiff for its violations of the provisions of the Act of May 13, 1927 in owning and carrying on a retail drug business on the demised premises in Hanover, Pennsylvania, under the title "Pharmacy" or "Drug Store," and through duly registered pharmacists in its employ, such business including the compounding, dispensing, preparation and sale at retail of drugs, medicines and poisons other than proprietary medicines and commonly used household drugs, when all the members or partners of the plaintiff corporation are not registered pharmacists.

Owen J. Roberts, Attorney for Plaintiff. Paul C. Wagner, Attorney for Defendants.

[fol. 100] EXHIBIT "A" TO STIPULATION

October 26, 1927.

Louis K. Liggett Company, Liggett Building, Forty-second Street and Madison Avenue, New York City, N. Y.

Gentlemen: I beg to acknowledge receipt of your letter of October 13th enclosing an application of your Company for the registration of, and permit to conduct, a pharmacy at 14 Carlisle Street, Hanover, Pennsylvania, together with check for $2.00 covering the permit fee.

I am reliably informed that the pharmacy which you propose to conduct at the above location was acquired by you subsequent to the approval of Act No. 491 of 1927 (Act of May 13, 1927) under the provisions of which it is unlawful for your Company to own and conduct the pharmacy for which application is made. It will therefore be impossible for the Board to issue a permit for this location.

Your application and check are herewith returned by order of the Board of Pharmacy.

Very truly yours, Charles P. Kramer, Director Division of Drug Store Registration.

[fol. 101] In United States District Court

[Title omitted]

Before Wooley, Circuit Judge, Dickinson and Kirkpatrick, District Judges, Specially Sitting

Opinion sur Trial Hearing on Bill, Answer and Proofs—Filed December 8, 1927

Dickinson, J.:

We have given this case the above dual sub-heading, and dispose of the motion for a preliminary restraining order at the request of counsel who have further stipulated all the facts that we might likewise dispose of the case on final decree.

The General Fact Situation

The Pennsylvania Legislature has passed a series of Acts of Assembly each of which has a more or less direct bearing upon this litigation.

The beginning may be said to be the Act of May 17th, 1917, P. L. 208. This Act in effect prohibited the use of the name or title "Drug Store" or any equivalent designation, in the conduct of any business by any one other than a "registered pharmacist" who was restricted to one such "store," but the prohibition did not extend to any "owner" who employed a "registered pharmacist" to "conduct" the business.

The supplementary Act of May 26th, 1921, P. L. 1171, prohibited the opening of any "pharmacy" without a permit from the "Pennsylvania Board of Pharmacy" and the Board from granting such permit unless the management of the store was in charge of a "registered pharmacist."

We follow the phrase of counsel for the plaintiff in the statement that the constitutionality of neither of these Acts is under attack.

Then comes the Act of May 13th, 1927, P. L., upon which a most vigorous condemnation is visited. It is entitled "A Supplement" to the Act of 1917. It opens with a pro-[fol. 102] hibition of ownership "of any pharmacy or drug store" by any one other than a "licensed pharmacist" with a saving (whole or partial) of the rights of those now lawfully engaged in the business to "continue to own &c.," and subjects those violating the provisions of the Act to a fine prohibitive in its effect.

A listing of the points of criticism of the Act would expand itself into an argument, so we content ourselves with the statement that it is charged to be unconstitutional on the broad grounds of being "an unreasonable and arbitrary" interference with "the plaintiff's business;" its freedom of contract, and is likewise said to be an impairment "of the obligation of existing contracts," by which we take to be meant that there is a practical compulsion put upon the plaintiff to default on contracts into which it has entered. The prayers of the Bill are for an ad interim restraining order and final decree preventing the defendants from enforcing the penalties of the Act of Assembly.

Conclusions Stated

The conclusions reached are that the restraining order be refused and the Bill be dismissed, with costs, for want of equity.

Discussion

We are led to these conclusions by the same line of reasoning so that they need not be discussed separately.

Jurisdiction

A preliminary question is raised which, in some of its phases, is one of jurisdiction in the broad meaning of that term. The Bill is said in this respect in effect to be premature because inter alia no criminal proceedings have been instituted. One of the objections usually urged to Bills of this general character is the assumption, as it is termed by Courts of Equity, of the power to dictate to the Courts of Criminal Law how they are to rule in cases which may come before them. So far as this question is meant to be raised, we think it to have been settled by the case of

Foster Cline vs. Frink Dairy Co. et al. (not yet reported). Indeed to await (so far as this feature goes) an actual prosecution would be at the cost of the right to ask for a re-[fol. 103] straining order. We are not sure how far these general jurisdictional questions are urged since the stipulation reached by counsel, but we think they are all set at rest by

Terrace vs. Thompson, 263 U. S. 197.
So. Ry. Co. vs. Greene, 216 U. S. 400.
Carroll vs. Greenwich Ins. Co., 199 U. S. 401.

The stipulation has relieved us of the duty of stating the facts, and we further see no need of distinguishing between the right to continue business at a store being conducted at the time the Act of Assembly was passed and one opened afterwards.

The real question presented is the constitutionality of the Pennsylvania Act of Assembly of May 13th, 1927. We accordingly go directly to that Statute. A few general observations may serve the purpose of an approach to the question to be decided.

There is general accord upon the proposition that the idea of a confederated union of States, which is a feature of our form of government, can be carried out only by refusing interference on the part of the Courts of the United States with the laws of the several States, except so far as may be necessary to preserve to every litigant his rights as a citizen of the United States. The rights, which are here invoked, assured to citizens of the United States by the Fourteenth Amendment, must of course be enforced by the Courts. Beyond this however we cannot go. The security of his person and enjoyment of his property are among the rights of every citizen of the United States, and that the one cannot be invaded nor he be deprived of the other otherwise than by what is known as "due process of law" is a broad proposition to which all assent. When, however, the averment is of an encroachment by and under the authority of an Act of Assembly duly passed by the Legislature of a State, then what is and what is now "due process of law" becomes all important. The list of cases dealing with this general theme is a long one but there is accord in this case upon the thought that the Act of As-

sembly should be upheld if the enactment has a substantial [fol. 104] relation to the public interests. We take this to mean that if there is such relation the Statute cannot be found to be an exercise of the arbitrary power of encroachment upon the personal liberty of any one affected by the law nor can it be said to be a like arbitrary exercise of the power to take from any one his property.

Without attempting by any other analysis of the cases, the following among those sited to us, some by the plaintiff and others by the defendant, may be listed as ruled upon the differentiation to which we have referred.

Weaver vs. Palmer, 270 U. S. 402.
Burns vs. Bryan, 264 U. S. 504.
Smith vs. Texas, 233 U. S. 630.
Cusack vs. Chicago, 242 U. S. 526.

This takes us back to the question of whether we are prepared to find that the public has no concern in the business of a drug store or the calling of a phamacist. If we do so find, we do it with the knowledge open to all and common to very many, that at one time in all parts of the country and still in what are called the rural districts, the local pharmacist or druggist serves many of his customers and patrons as their physician. Confidence in his judgment and skill had much to do with this practice; economy had perhaps more. So general was it that the physician of the neighborhood was likewise the druggist. He served the more well-to-do, and those who could not come to him, by visiting them at their homes. He served the others as they came to him at his drug store. They all received the like treatment. The only difference was in the rate of charge because he took with him his medicines on his rounds of the homes of his patients just as he gave professional advice and dispensed his medicines to those who came to his store. It is said that a relatively small part of the business of a drug store is the compounding of medicines and the filling of prescriptions. This is true.

There is a type of drug store known as the "cut rate," which perhaps has no prescription counter at all and scarcely ever more than a nominal one. The medicines and remedies sold are so called "proprietary" medicines. They

[fol. 105] are none the less as truly "prescribed" by the druggist as are the "filled prescriptions," and are just as much taken upon the faith and confidence of the user in the druggist as is the medicine "prescribed" by a physician.

We, of course, recognize the force of the argument addressed to us based upon the distinction between a law which forbade any one other than a skilled pharmacist to compound medicines and another law which forbade any one other than pharmacists to have a share in the ownership in the business of a drug store. Even here, however, we are unable to say that there is not a substantial relation of ownership to the public interests. The medicines must be in the store before they can be dispensed to those who come to the store for the help which medicines can afford them. What is there is dictated not by the judgment of the pharmacist who hands it out to customers but by those who have the financial control of the business. It may be the legislature thought that a corporate owner, in purchasing drugs, might give a greater regard to the price than to the quality; and if such was the thought of the legislature can this Court say it was without a valid connection with the public interests and so unreasonable as to be unlawful? How that matter affects the public interest is illustrated by another kind of business.

A number of years ago the business of selling liquor was wholly in the hands of those who sold it. Inn-keepers and Tavern-keepers stood high in the respect of their neighbors. The practice grew up of Brewers and Distillers taking over the ownership of places where intoxicating liquors were sold. The saloon when ownership and management became separated soon became a nuisance and a menace so that its abolishment was demanded, and no one at any time would wish to witness its return.

A saloon is of course not a drug store but the point is that the provisions of this Act can no more be said to have no substantial relation to the public interests than a law would have been which, with the object of preventing nuisances, forbade any one but tavern-keepers themselves from having a financial interest in the tavern-keeping business. That [fol. 106] financial ownership interest and managerial sense of responsibility each have a relation to a wise public policy

and hence to the public interest is evidenced by the experience of the Courts in Pennsylvania upon whom was thrust the responsibility of granting liquor licenses. Every Judge who had to do with this duty was soon brought to realize the element of danger to the public conduct of tavern and saloons the moment the profits from the sales of liquor went to owners who were removed from and had no sense of the responsibility of management. There enters into every business the two motives of a wish for profit and a sense of duty obligation towards those with whom the management deals. When these are joined the latter operates to some extent; the moment they are separated the former is in sole control. This thought deals with the relation between things which should be joined and the public policy of not permitting them to be separated. There is likewise the thought of things which should not be joined. The Act of Assembly of June 9th, 1881 providing that no license to sell intoxicating liquor be granted to the owner of a place of amusement is an illustration. The relation to the public interests is of course here more direct and the recognition of it in legislation more common but in principle the two legislative acts are alike.

Because of our inability to make the finding that the instant Act of Assembly has no substantial relation to the public interest, we cannot hold it to be unconstitutional. What opinion may be entertained of the wisdom of much of the legislation of this general character and of the motives of those who have prompted it, the Courts are not called upon to express.

Decrees in accordance with this opinion may be submitted.

[fol. 107] In United States District Court

[Title omitted]

Before Wooley, Circuit Judge, and Dickinson and Kirkpatrick, District Judges, Specially Sitting

Interlocutory Decree—Filed December 22, 1927

And now, to-wit, December 22nd, 1927, this cause came on to be heard at this term, and was argued by counsel, and

upon consideration thereof, it is ordered, adjudged and decreed as follows:

1. The plaintiff's motion for a preliminary injunction is denied and the restraining order prayed for by the plaintiff is refused.

By the Court.

Dickinson, Judge.

[fol. 108] In United States District Court

[Title omitted]

Before Woolley, Circuit Judge, and Dickinson and Kirkpatrick, District Judges, Specially Sitting

Final Decree—Filed December 22, 1927

And now, to-wit, December 22nd, 1927, this cause came on to be heard at this term, and was argued by counsel, and upon consideration thereof, it is ordered, adjudged and decreed as follows:

1. The Bill of Complaint be, and is hereby dismissed for want of equity and at the costs of the plaintiff.

By the Court.

Dickinson, Judge.

[fol. 109] In United States District Court

[Title omitted]

Petition for Appeal—Filed December 22, 1927

The above named plaintiff, feeling aggrieved by the decrees made and entered in the above entitled proceeding in equity on the 22nd day of December, A. D. 1927, does hereby appeal from the said decrees to the Supreme Court of the United States, for the reasons specified in the Assignments of Error filed herewith; and prays that this appeal may be allowed, and that a transcript of the record proceedings

and papers, upon which the said decrees were made, duly authenticated, may be sent to the Supreme Court of the United States under the rules of the said Court in such cases made and provided.

And your petitioner further prays that the proper order relating to the security to be required of it be made.

Dated December 22nd, 1927.

Roy M. Sterne, Owen J. Roberts, Attorneys for Plaintiff.

[fol. 110] In United States District Court

[Title omitted]

Assignments of Error—Filed December 22, 1927

And now, to-wit, December 22nd, 1927, comes the plaintiff in the above entitled proceeding in equity and files the following Assignments of Error, upon which it will rely in the prosecution of its appeal from the decrees made by this Honorable Court on the 22nd day of December A. D. 1927 in the above entitled cause.

I

That the United States District Court for the Eastern District of Pennsylvania erred in denying the preliminary injunction prayed for by the plaintiff.

II

That the United States District Court for the Eastern District of Pennsylvania erred in dismissing the Bill of Complaint for want of equity.

III

That the United States District Court for the Eastern [fol. 111] District of Pennsylvania erred in imposing the costs of the above entitled proceeding in equity upon the plaintiff.

Wherefore the appellant prays that the aforesaid decrees be reversed and that the United States District Court for the Eastern District of Pennsylvania be ordered to enter a decree in accordance with the prayers of the Bill of Complaint, or in such form as the Supreme Court of the United States shall deem just.

Roy M. Sterne, Owen J. Roberts, Attorneys for Appellant.

[fols. 112-116] In United States District Court

[Title omitted]

Order Allowing Appeal—Filed December 22, 1927

And now, to-wit, December 22nd, 1927, the foregoing appeal to the Supreme Court of the United States is allowed upon the giving by the above named plaintiff of a bond, as required by the law, in the sum of Two Hundred and Fifty Dollars ($250.00).

Dickinson, Judge.

[fol. 117] Clerk's certificate omitted in printing.

[fol. 118] In Supreme Court of the United States

Statement of Points to be Relied upon and Designation of Parts of Record to be Printed—Filed January 7, 1928

And now, to-wit, January 6th, 1928, Owen J. Roberts, Esq., counsel for the above named appellant, pursuant to Rule 11 of the Revised Rules of this Court, files the following

Designation of Points

I. That the specially constituted Trial Court erred in denying the Preliminary Injunction prayed for by the appellant.

II. That the specially constituted Trial Court erred in dismissing the Bill of Complaint for want of equity.

III. That the specially constituted Trial Court erred in imposing the costs of this cause upon the appellant.

The said Owen J. Roberts, Esq., thinks that the below listed parts of the record are material and necessary for the consideration of the above points; and therefore requests the Clerk of this Court to have printed the follow-
[fols. 119 & 120] ing

Parts of the Record

Bill of Complaint.

Injunction Affidavit of John S. Alley.

Injunction Affidavit of William C. Watt.

Reply Affidavit re Preliminary Injunction of Thomas J. Baldrige.

Reply Affidavit re Preliminary Injunction of Pennsylvania Board of Pharmacy (By Charles F. Kramer, of said Board).

Rebuttal Affidavit of John S. Alley on Behalf of Plaintiff.

Opinion of the Court sur motion for Preliminary Injunction dated July 25, 1927.

Supplemental Bill of Complaint.

Answer to Bill of Complaint.

Answer to Supplemental Bill of Complaint.

Renewed Motion for a Preliminary Injunction dated October 31, 1927.

Stipulation of Counsel dated November 1, 1927.

Opinion of the Court sur motion for Preliminary Injunction and sur Trial Hearing on Bill, Answer and Proofs, dated December 8, 1927.

Interlocutory Decree dated December 22, 1927.

Final Decree dated December 22, 1927.

Petition for Allowance of Appeal and Assignments of Error.

Order of Allowance of Appeal.

Owen J. Roberts, Attorney for Appellant.

Service of the above Designation of Points Intended To Be Relied Upon and Of Parts To Be Printed is hereby accepted and acknowledged, this fourth day of January, 1928.

Paul C. Wagner, Attorney for Appellees.

[fol. 121] [File endorsement omitted.]

Endorsed on cover: File No. 33,125. E. Pennsylvania D. C. U. S. Term No. 673. Louis K. Liggett Company, Appellant, vs. The Honorable Thomas J. Baldrige, Attorney General of the Commonwealth of Pennsylvania; Charles C. Campbell, Charles F. Kramer, et al., etc., et al. Filed December 31st, 1927. File No. 33,125.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. [redacted] 341

LOUIS K. LIGGETT COMPANY,

Appellant,

vs.

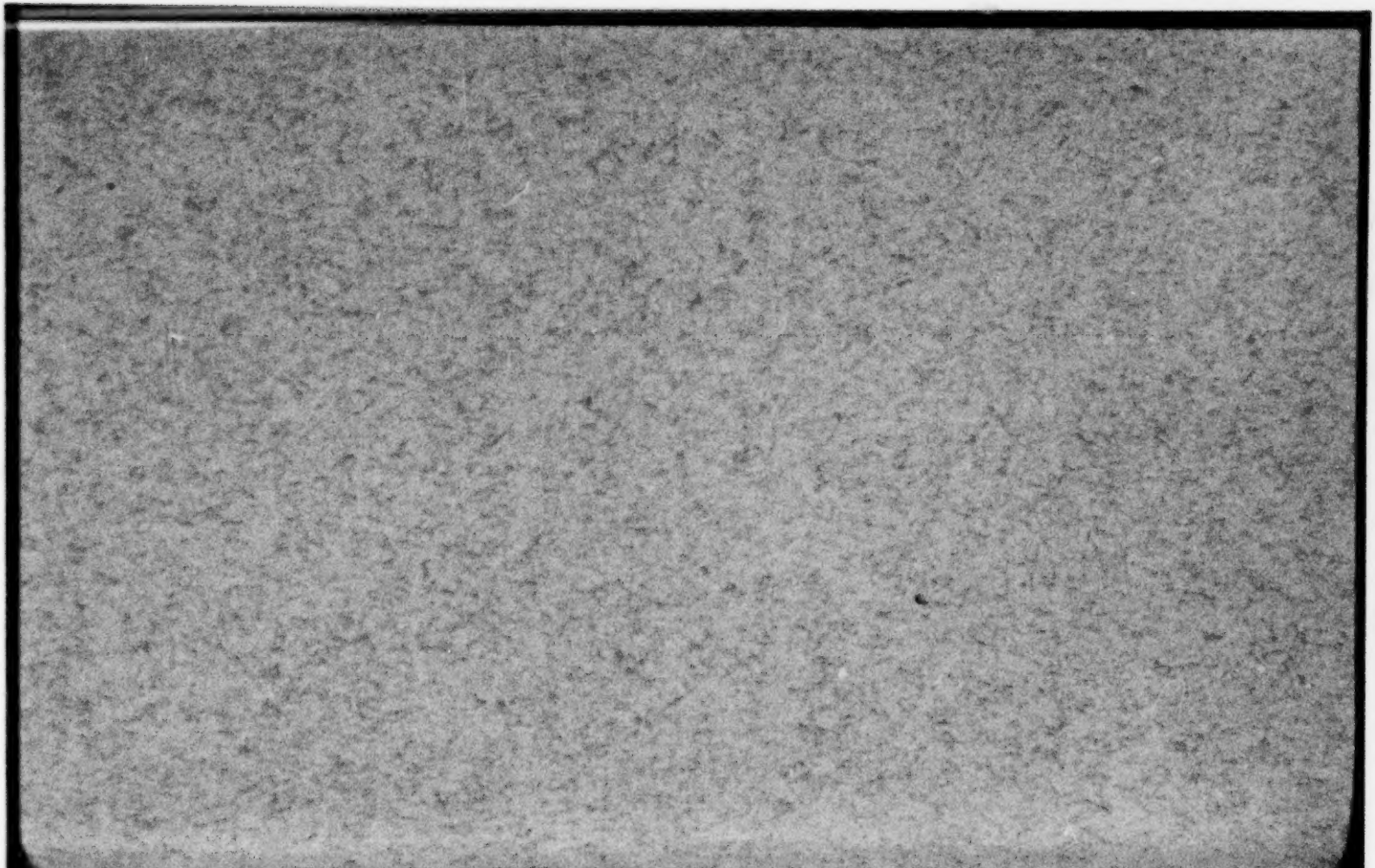
THE HONORABLE THOMAS J. BALDRIGE, Attorney General of the Commonwealth of Pennsylvania; CHARLES C. CAMPBELL, CHARLES F. KRAMER, et al., etc., et al.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR APPELLANT.

GEORGE O. CHANDLER,
ROY M. STEPHE,
OWEN J. ROBERTS,
Attorneys for Appellant.

Press of Allen, Lane & Scott, Philadelphia.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1927. No. 673.

Louis K. Liggett Company, Appellant,

vs.

The Honorable Thomas J. Baldrige, Attorney General of the Commonwealth of Pennsylvania; Charles C. Campbell, Charles F. Kramer, et al., etc., et al.

BRIEF FOR APPELLANT.

A. OFFICIAL REPORT OF THE OPINION BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported in 22 Fed. (2d) 993 (1927).

B. STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

(1). The decrees to be reviewed are those of a specially constituted statutory court of the District Court under section 266 of the Judicial Code; and are dated December 22, 1927 (R. 83-84).

(2). The jurisdiction of this Court is based upon section 266 of the Judicial Code, as amended by the Act of February 13, 1925.

(3). The following cases are believed to sustain such jurisdiction, namely:

Clark vs. Poor, 274 U. S. 554 (1927);
Smith, et al., vs. Wilson, et al., 273 U. S. 388 (1927);
Moore vs. Fidelity & Deposit Co., 272 U. S. 317 (1926);
Ex Parte Buder, 271 U. S. 461 (1926).

C. STATEMENT OF THE CASE.

This appeal challenges the constitutionality of the Pennsylvania act of May 13, 1927.

This act contains *no provision* respecting the compounding of drugs, chemicals or poisons, the quality or strength of the same, the sale of the same, the compounding of prescriptions, the advertising of drugs, the labelling of the same, methods or procedure in drug stores, the competency of employees therein, or the persons permitted to serve the public therein.

All of the above matters are fully and adequately covered by other legitimate police legislation in Pennsylvania.*

The act of May 13, 1927, deals solely with the *ownership of drug stores*, ignoring all else.

The appellant contends that the act, on its face, interferes with the innocent and lawful ownership of property and unconstitutionally deprives it of business rights.

Retail drug stores in the United States sell and deal in drugs, medicines (including standard formula and proprietary medicines and household drugs, already prepared and packaged for sale, and medicines compounded on the premises by licensed pharmacists from physicians' prescriptions or formulae, and sold on individual order), bandages, absorbent cotton, thermometers, hot water bottles, and hospital and sick room utensils and supplies, dentrifices, tooth

* See the acts quoted pp. 15-27, *infra*

brushes, soaps, cosmetics, creams, powders and articles of personal hygiene, cigars, candy and soda fountain drinks (R. 63, and common knowledge).

The backbone of the business is found in the closely related medicine, prescription and hospital departments, together with the fancy or toilet goods departments, which do about 63% of the business, and which characterize the business as a drug business. The other departments, cigar, candy and soda, have long been associated, as a matter of fact and in the public mind, with drug stores, and are usually found in retail drug stores (R. 63).

Under the laws of Pennsylvania a "pharmacy" is a "retail drug store," which in turn is a place where drugs or medicines are compounded and sold at retail (Act of May 17, 1917, as amended, Sec. 1, *infra*, p. 22).

A licensed pharmacist *is a chemist* in pharmaceuticals who has been examined and granted a certificate of competency and registered as a pharmacist.

The Liggett Company is a Massachusetts corporation. Since 1909 it has fulfilled its charter purpose of owning and conducting retail drug stores in the several States (R. 40, 47).

Since March 1, 1916, it has been duly registered in Pennsylvania as a foreign corporation. Its certificate of registry authorizes it to conduct "retail drug stores" (R. 67, par. 1).

On May 12, 1927, its business in Pennsylvania was being carried on at twenty-eight retail drug

stores, in thirteen cities and towns. Sixteen of these stores were located in Philadelphia, and one in each of twelve other cities and towns, namely, Pittsburgh, Erie, Reading, Wilkes-Barre, Johnstown, Lancaster, York, Easton, Williamsport, Altoona, Chambersburg and Chester. These stores represented an investment of $480,000. Appellant's gross business for 1926 in the State was $2,899,789.88, of which $163,487.40 (something over 6%) was in prescriptions, and $793,-849.86 (approximately 29%) in medicines and articles of standard formulae, and a little less than 6% in hospital goods, and 22% in the fancy goods department. Of the balance approximately 6% was in candy, 14% in cigars and cigarettes, and 16% in soda fountain business (R. 3, 40, 42, 47, 49, 63).

All of said twenty-eight retail drug stores of the Liggett Company are under the management and personal supervision of pharmacists duly registered as such under the Pennsylvania Act of May 17, 1917, P. L. 208 (each of said pharmacists having personal supervision of not more than one drug store); and all of said stores are duly registered with and have permits issued by the Pennsylvania Board of Pharmacy under the Act of May 26, 1921, P. L. 1172 (R. 3, 4, 40, 47).

To meet the increasing demands of its business and in consummation of negotiations begun months before appellant knew anything of the contemplated enactment of the ownership law, the Liggett Company, on May 11, 1927, contracted to buy a retail

drug business in Pottsville, Pennsylvania. It had also on February 20th, 1926, rented a building, possession of which was to be taken July 15th, 1927, for a new store in Philadelphia, and was preparing, in accordance with the normal course of its business, to establish other stores in Pennsylvania, in cities and towns and at locations where it previously had had no stores (R. 4-5).

On May 13, 1927, the act in question became a law.*

The Liggett Company, like every other corporation, foreign or domestic, every partner, every individual owning any interest in a drug store, was thereupon confronted with a statutory declaration **making it a crime for any but a licensed pharmacist,**

(*a*) to own a pharmacy;

(*b*) to be a partner in a firm owning a pharmacy;

(*c*) to own a share of stock in a corporation owning a pharmacy.

That the act is not a police regulation is evident from the fact that any individual owner, though not a registered pharmacist, and any partnership or corporation, though not composed solely of registered pharmacists, which at the date of the act owned a pharmacy, may continue to do so, but must not own *any new pharmacies*. Further that, though not a registered pharmacist, an administrator, executor or trustee of a deceased owner may own such pharmacy so long as necessary to settle the estate. Further that the act specifically permits the owner-

* The act is printed in full, *infra*, pp. 11-13.

ship by a person, not a registered pharmacist, of a store in which are sold proprietary medicines and household drugs put up, *inter alia,* by *wholesale grocers.*

The purchase of the Pottsville store and the opening of its new Philadelphia store would involve a criminal prosecution and heavy fines under the provisions of the Act here in question, although its business admittedly has been conducted in strict compliance with the laws and regulations relating to the compounding and sale of medicines and the operation of drug stores (R. 47, 54).

Confronted with the Act of May 13th, 1927, depriving it of its constitutional rights, *i. e.,* the right to own these stores, the appellant on June 4th, 1927, filed its bill to prevent the State Board of Pharmacy, the Attorney-General of the Commonwealth of Pennsylvania and the District Attorneys for Philadelphia and Schuylkill Counties, from enforcing against it the provisions of the Act of May 13, 1927, and it prayed for a preliminary injunction (R. 1 and 8).

The statutory court (Wooley, *Cir J.,* Dickinson, *D. J.,* and Kirkpatrick, *D. J.*), apparently not considering that the contract to purchase the Pottsville store (although the store was to be taken over within a few days after the date of the preliminary hearing) created sufficient immediacy of danger of prosecution, refused, or delayed action, on a preliminary injunction (R. 64).

It granted leave to plaintiff, however, to renew its motion for a preliminary injunction (R. 64).

Thereafter plaintiff filed a supplemental bill, showing that it had completed the purchase of the Pottsville store (R. 64).

Later, after the defendants had answered, plaintiff renewed its motion for a preliminary injunction (R. 74), based on its conduct of the Pottsville store, its purchase of a drug store at Hanover, Pa., and the expressed refusal of the Pennsylvania Board of Pharmacy to grant a license therefor and the expressed intention of the Attorney-General to prosecute Liggett Company under the act (R. 75-77).

The case being then at issue, on the bills and answers filed, and on the evidence contained in the affidavits and stipulations on file, the statutory court of three judges by interlocutory decree denied the pending motion for a preliminary injunction (R. 83); and by final decree (R. 84) dismissed the bill for want of equity.

From this action the plaintiff, Liggett Company, took the present appeal.

D. ERRORS RELIED ON.

1. The court erred in denying plaintiff's motion for a preliminary injunction.

2. The court erred in holding that plaintiff's bill should be dismissed for want of equity.

3. The court erred in holding that the Act of May 13, 1927, was a proper exercise of the police power.

4. The court erred in holding that there was a reasonable relation between the mere ownership of a drug store and the safeguarding of the public health.

5. The court erred in holding that there is a logical connection between the alleged object of the Act—namely the conservation of the public health—and the means adopted to accomplish that object—namely the limitation of ownership of drug stores to licensed pharmacists or corporations or partnerships composed of licensed pharmacists.

6. The court erred in holding that it was a valid exercise of the police power to require the plaintiff corporation, in order to own drug stores, to compel each of its stockholders, or every person owning an interest in its business, to become a registered pharmacist.

7. The court erred in holding that the mere ownership of stock in a drug store conducted solely by a registered pharmacist, might be denounced as a crime under the police power.

8. The court erred in not holding the act of May 13, 1927, violative of the Fourteenth Amendment of the Constitution of the United States.

E. THE TEXT OF THE ACT OF MAY 13, 1927.

(Pa. Pamph. Laws 1927, p. 1009.)

The act in full is as follows:—

"A Supplement.

"To the act, approved the seventeenth day of May, one thousand nine hundred and seventeen (Pamphlet Laws two hundred and eight), entitled 'An act to regulate the practice of pharmacy and sale of poisons and drugs, and providing penalties for the violation thereof; defining the words "drugs" and "poison"; and providing for the appointment of a board which shall have in charge the enforcement of said law, and the power to make rules and regulations for the enforcement of said law; and providing for the purchase of samples of drugs for determining their quality, strength, and purity,' regulating the ownership of pharmacies and drug stores; and providing penalties.

"Section 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met and it is hereby enacted by the authority of the same That every pharmacy or drug store shall be owned only by a licensed pharmacist, and no corporation, association or co-partnership shall own a pharmacy or drug store, unless all the partners or members thereof are licensed pharmacists; except that any corporation organized and existing under the laws of the Common-

wealth or of any other state of the United States, and authorized to do business in the Commonwealth, and empowered by its charter to own and conduct pharmacies or drug stores, and any association or copartnership which, at the time of the passage of this act, still owns and conducts a registered pharmacy or pharmacies or a drug store or drug stores in the Commonwealth, may continue to own and conduct the same; but no other or additional pharmacies or drug stores shall be established, owned, or conducted by such corporation, association, or copartnership, unless all the members or partners thereof are registered pharmacists; but any such corporation, association, or copartnership, which shall not continue to own at least one of the pharmacies or drug stores theretofore owned by it, or ceases to be actively engaged in the conduct of a pharmacy, shall not be permitted thereafter to own a pharmacy or a drug store, unless all of its partners or members are registered pharmacists; and except that any person, not a licensed pharmacist, who, at the time of the passage of this act, owns a pharmacy or a drug store in the Commonwealth, may continue to own and conduct the same, but shall not establish or own any additional pharmacy or drug store, or if he or she ceases to operate such pharmacy or drug store, shall not thereafter own a pharmacy or drug store, unless he or she be a registered pharmacist; and except that the administrator, executor, or trustee

of the estate of any deceased owner of a registered pharmacy or drug store, may continue to own and conduct such pharmacy or drug store during the period necessary for the settlement of the estate: Provided, That nothing in this section shall be construed to prevent or affect the ownership, by other than a registered pharmacist, of a store or stores wherein the sale of manufacture of drugs or medicines is limited to proprietary medicines and commonly used household drugs, provided such commonly used household drugs are offered for sale or sold in packages which have been put up ready for sale to consumers by pharmacists, manufacturing pharmacists, wholesale grocers, or wholesale druggists.

"SECTION 2. Any person, copartnership, or corporation, violating the provisions of this act, shall be guilty of a misdemeanor and, upon conviction thereof, shall be sentenced to pay a fine of not more than one hundred dollars. Each day any such pharmacy is owned contrary to the provisions of this act shall be considered a separate offense."

F. ARGUMENT.

I. Preliminary statement.

Appellees have planted their defense of the act solely on the police power. They state in their answer (R. 69, par. 18) and in their affidavits (R. 56, par. 11; R. 59, par. 11) that the act "was enacted by the legislature of the Commonwealth of Pennsylvania, by virtue of the police power inherent in it to legislate for the public good, health and welfare."

We insist that the act is not in any proper sense an exercise of the police power, because:

It does not purport to be an exercise of the police power.

That power, as regards the drug store business, has been fully and adequately exercised by other and prior legislation, to which the present act bears no logical relation whatever.

The act is a crass attempt to interfere with the lawful ownership of property, and to create a monopoly.

In view of the existing state of the law when this act was passed, and in view of the very terms of the act, one need not seek far to discover the sole purpose of its passage. The registered pharmacist desires a monopoly of the business of vending drugs and proprietary medicines and compounding prescriptions. He does not want the competition of partnerships, corporations, and chain stores. He procures this act to be passed and the competition he fears is to a great extent at once eliminated and will ultimately be utterly destroyed.

II. Prior police legislation in force.

It is demonstrable that prior and existing police legislation in Pennsylvania covered every phase of the manufacture and sale of drugs. This legislation, as will at once be apparent, could not be effective if it had dealt with the mere matter of the ultimate *ownership* of the business. Ownership is a passive state. Compounding prescriptions, buying and selling drugs and chemicals, requires an act or acts. Obviously, legislation to have any real relation to the preparation of drugs, the qualifications of persons compounding prescriptions and the sale of medicines of the proper standard, must operate upon the actor. Such was the police regulation of the conduct of a drug store prior to the act of May 13, 1927, as shown by the following:

As a preliminary proposition, it is to be noted that

> (a) *No matter who owned a drug store, no one, pharmacist or non-pharmacist, owner or employee, except a physician, could prescribe remedies for illness.*

Act of June 3, 1911, P. L. 639. (West Pa. Statutes, Sec. 16,799.)

> SEC. 1. On and after January first, nineteen hundred and twelve, it shall not be lawful for any person in the State of Pennsylvania to engage in the practice of medicine and surgery, or to hold himself or herself forth as a practitioner in medicine and surgery, or to assume the title of

> doctor of medicine and surgery, or doctor of any specific disease, or to diagnose diseases, or *to treat diseases by the use of medicines and surgery*, or to sign any death certificate, or to hold himself or herself forth as able to do so, excepting those hereinafter exempted, unless he or she has first fulfilled the requirements of this act and has received a certificate of licensure from the Bureau of Medical Education and Licensure created by this act, which license shall be properly recorded in the office of the Superintendent of Public Instruction at Harrisburg. (Italics ours.)

In view of the foregoing, it is evident how far afield the court below went when, as the basis of its decision, it said, "the local pharmacist or druggist serves many of his customers as their physician." (R. 81, middle.) There is, of course, no evidence in the record to support this statement. If any one had offered such evidence, he would have been offering evidence that many people were violating a criminal statute, and going unpunished.

We think, however, first that the court was badly in error in its supposed judicial notice of such fact. We believe that pharmacists do obey the law and refrain from prescribing remedies for illness. But if they do not, the state cannot stop their illegal practices by providing that they alone shall *own* drug stores. That certainly will not stop the evil practice. The way to stop it, if it exists, is to enforce the statute above quoted.

(b) ***No matter who owned the store, only a certain quality of drugs could be used or sold therein.***

The pure drug law provides (Act of May 8, 1909, P. L. 470; West Pa. Statutes Sec. 9,337):

> SEC. 1. It shall be unlawful for any person, partnership or corporation to manufacture or sell, offer for sale, or have in possession with intent to sell, any drug which is adulterated or misbranded, within the meaning of this act.
>
> SECTION 5. That the enforcement of this act shall be entrusted to the State Pharmaceutical Examining Board, who shall receive as compensation for their services the same *per diem* and expenses that they receive as members of the State Pharmaceutical Examining Board, under the act of May twenty-four, one thousand eight hundred and eighty-seven. They shall make uniform rules and regulations for carrying out the provisions of this act, including the collection and examination of specimens of drugs manufactured or offered for sale in the State; and shall appoint an executive secretary, who shall work under the directions of said board; and they shall also have power to employ such agents, chemists, attorneys, and assistants as may be necessary for this purpose, and they, or their duly authorized agents shall have the right to enter any place where drugs are compounded, dispensed, or sold, for the purpose of purchasing samples; and shall have the right to purchase samples in order that tests may be made to determine whether such drugs conform to the standards of strength, quality, and purity

as fixed by the laws of this Commonwealth. Any person who intentionally prevents or knowingly refuses, to permit any authorized person to enter any place where drugs are compounded, dispensed, or sold, for the purpose of purchasing samples, or refuses to sell a sample or samples of drugs for the purpose of examination, shall, upon conviction, be sentenced to pay a fine of ten dollars ($10.00) and costs of prosecution. Provided, however, that this section shall not be construed as granting any right or privilege to said board, or their agents thereof, of inspecting any place where drugs are sold or manufactured, or any formula or process of manufacture of any drug.

SECTION 8. That it shall be the duty of each district attorney, to whom the Board shall report any violation of this act, to cause appropriate proceedings to be commenced and prosecuted in the proper court, without delay, for the collection of the penalties in such case made and provided.

Act of June 7, 1917, P. L. 564 (West Pa. Statutes, Sec. 9,338).

SEC. 2. That the term "drug," as used in this act, shall include all medicines and preparations recognized in the ninth revision of the Pharmacopoeia of the United States, the fourth edition of the National Formulary, or the American Homeopathic Pharmacopoeia, for the internal or external use, and any substance or mixture of substances, intended to be used for the cure, mitigation, or prevention of disease of either man or other animals.

Act of April 27, 1927, P. L. 458 (West Pa. Statutes, Sec. 9,339).

SEC. 1. For the purpose of this act an article shall be deemed to be adulterated:

First.—If a drug is sold under or by any name recognized by the tenth revision of the Pharmacopoeia of the United States, the fifth edition of the National Formulary, or the American Homeopathic Pharmacopoeia, it differs from the standard of strength, quality, or purity as determined by the test or formula laid down in the tenth revision of the Pharmacopoeia of the United States, the fifth edition of the National Formulary, or the American Homeopathic Pharmacopoeia: Provided, That no drug defined in the tenth revision of the Pharmacopoeia of the United States, the fifth edition of the National Formulary; or the American Homeopathic Pharmacopoeia, except official preparations of opium, iodine, peppermint, camphor, ginger, and ethyl nitrit, shall be deemed to be adulterated, under this provision, if the standard of strength, quality, or purity be plainly stated, in juxtaposition with the official standard of strength, quality, and purity, upon the bottle, box, or other container thereof, although the standard may differ from that determined by the test or formula laid down by the tenth revision of the Pharmacopoeia of the United States, the fifth edition of the National Formulary, or the American Homeopathic Pharmacopoeia.

Second.—If the strength or purity fall below the professed standard or quality under which it is sold.

In view of the foregoing, it seems needless to point out that the wholesaler of drugs, and the man who compounds and sells them in the retail drug store (the registered pharmacist), and the owner of the store, whether he be a registered pharmacist or not, are all alike bound by the law as to pure drugs.

Will conferring a monopoly of *ownership* of retail drug stores on registered pharmacists, compel the manufacturers of drugs, who supply the retail stores, to comply with the law as to constituents of drugs and purity? To ask the question is to answer it.

(c) *No matter who owned the store, none but a duly educated and licensed registered pharmacist could compound prescriptions therein.*

Act of May 17, 1917, P. L. 208 (West Pa. Statutes, Sec. 9,323).

SEC. 13. That hereafter it shall be unlawful to sell drugs, medicines, or poisons at retail, *or to compound physicians' prescriptions*, or to conduct a pharmacy, or to practice as a pharmacist or assistant pharmacist, except in compliance with the provisions of this act of Assembly: Provided, however, That nothing in this act of Assembly shall be so construed as to interfere with students of pharmacy, or other employees in a pharmacy, from performing such duties as may be assigned to them by and under the supervision of a pharmacist or assistant pharmacist: And provided further, That the compounding of physicians' prescriptions, or the dispensing and selling of poisons at retail, shall not be permitted except under the strict supervision

and in the presence of a pharmacist or assistant pharmacist. (Italics ours.)

Nothing in this act of Assembly shall be construed so as to prevent an authorized practitioner of medicine from administering or dispensing such drugs to bona fide patients as he or she shall deem necessary: Provided, however, That such drugs so administered or dispensed shall conform to the standards of strength, quality, and purity as fixed by the laws of this Commonwealth; nor prevent the sale or manufacture of proprietary medicines; nor prevent storekeepers from dealing in and selling commonly used household drugs when the same are offered for sale or sold in packages which have been put up ready for sale to consumers by pharmacists, manufacturing pharmacists, wholesale grocers or wholesale druggists. Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be sentenced to pay a fine of not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00), or imprisonment for not more than one year, or either or both, in the discretion of the court.

If this was true, how did it help matters to put the ownership of the store in the man who under the law was the only man who could compound prescriptions? Echo answers, how.

(d) *No matter who owned the store, none but a registered pharmacist could be in charge thereof, and he could be in charge of but one store.*

Act of May 17, 1917, P. L. 208 (West Pa. Statutes, Sec. 9,324).

SECTION 1. That (*a*) the term "pharmacy," when not otherwise limited, shall, for all the purposes of this act, be taken to mean a retail drugstore, or any place *where drugs, medicine, or poisons are compounded, dispensed, prepared, or sold at retail;* (*b*) the term "drug," as used in this act, shall include all medicine and preparations recognized in the United States Pharmacopoeia, the National Formulary, or the American Homeopathic Pharmacopoeia, for internal and external use, and any other substance, or mixture of substances, intended to be used for the cure, mitigation, or prevention of disease of either man or other animals; (*c*) *the term "pharmacist" shall, for all purposes of this act, be deemed to mean a person who is properly registered, in accordance with this act of Assembly, as a pharmacist;* (*d*) the term "assistant pharmacist" shall, for all the purposes of this act, be deemed to mean a person who is properly registered in accordance with this act of Assembly, as an assistant pharmacist: • • • (Italics ours.)

SECTION 2. State Board of Pharmacy.—The State Board of Pharmacy shall consist of the Superintendent of Public Instruction ex-officio and five persons, who shall be appointed for terms of six years from among the most skillful pharmacists in Pennsylvania, who are not teachers or instructors in any educational institution teaching pharmacy. • • •

And the said board shall have the right to employ chemists, agents, and clerks for the pur-

pose of carrying out the terms and conditions prescribed by this act of Assembly. * * *

SECTION 11. *That the Pennsylvania Board of Pharmacy shall enforce the provisions of this act of Assembly, investigate all complaints and charges of noncompliance, and prosecute all persons so offending whenever reasonable ground shall appear for such actions.* All fines imposed through a violation of this act shall be paid to the Secretary of the Pennsylvania Board of Pharmacy, and by him paid into the State Treasury, for use in the enforcement of this act of Assembly. (Italics ours.)

SEC. 14. That it shall be lawful for a pharmacist to take, use, and exhibit the titles: "pharmacist," "pharmacy," "druggist," "apothecary," or "drug store;" and to have charge of, engage in, conduct, or carry on, *for himself or for another*, the dispensing, compounding, or sale of drugs, chemicals, medicines, prescription, or poisons, anywhere within the State; *but he shall have personal supervision of not more than one pharmacy at the same time.* (Italics ours.)

It shall be lawful for an assistant pharmacist to take, use, or exhibit the title, "assistant pharmacist"; and to assist in the dispensing, compounding, or retailing of drugs, chemicals, medicines, prescriptions, or poisons, in a pharmacy *which is under the management and personal supervision of a pharmacist registered under the provisions of this act.* He may also perform such duties during the temporary absence of the pharmacist regularly in charge. (Italics ours.)

SECTION 15. That it shall be unlawful for any person, firm, or corporation to use the title:

"pharmacist," "assistant pharmacist," "druggist," or "apothecary," except as authorized by this act of Assembly, or hereafter to conduct or transact business under a name which contains as part thereof, with or without qualifying words, syllables, prefixes, or suffixes, the words: "drug store," "pharmacy," "medicine store," "medicine shop," or "drug shop," or any term having a similar meaning, or in any manner by advertisement, circular, poster, sign, symbol, insignia, or otherwise, describe or refer to the place of business conducted or carried on by such person, firm, or corporation, by the terms "drug store," "pharmacy," or any other term having a similar meaning unless the place of business is a drug store or pharmacy duly registered and authorized by the State Board of Pharmacy. Any person, firm, or corporation violating this section of this act of Assembly shall be guilty of a misdemeanor, and upon conviction shall be sentenced to pay a fine of not less than fifty dollars ($50.00) and the costs of prosecution.

SEC. 21. *That it shall be unlawful for any unregistered person to have charge of a pharmacy;* and anyone who permits any person, who is not registered or deemed to be a pharmacist or assistant pharmacist under this act, to take charge of a pharmacy, shall be guilty of a misdemeanor and either or both shall, upon conviction, be sentenced to pay a fine of not more than one hundred dollars ($100.00) and costs of prosecution. (Italics ours.)

(c) *No matter who owned the store, it must be registered, and could only be registered if under the supervision of a pharmacist.*

Act of May 26, 1921, P. L. 1172 (West Pa. Statutes, Sec. 9329 a-2).

SEC. 2. Upon application, on a form to be prescribed and furnished it, and the payment of a fee of two dollars ($2.00), the Pennsylvania Board of Pharmacy shall issue *a permit to conduct a pharmacy to such persons, associations, copartnerships, or corporations, as the board deems qualified to conduct such business.* All permits issued under the provisions of this act shall be exposed in a conspicuous place in the pharmacy for which it was issued, and shall expire on the first day of July following the date of issue. *No permit shall be issued unless it appears to the satisfaction of the board that the management of the pharmacy is in the charge of a pharmacist registered under the provisions of the act to which this is a supplement.* All permit fees collected under the provisions of this act shall be paid into the State Treasury. (Italics ours.)

SEC. 3. The Board of Pharmacy may suspend or revoke any permit obtained by false representations made in the application therefor, or *when the pharmacy for which a permit shall have been issued is kept open for the transaction of business without a registered pharmacist in charge thereof, and upon conviction for a second or any subsequent violation of any law of this Commonwealth or of the United States pertaining to the drug business or the sale of intoxicating liquors, or for aiding or abetting in the violation of any such law.* Before any permit is suspended or revoked, the holder thereof shall be given a hearing before the Board of Pharmacy, after

notice of the time and place of such hearing and of the charges made against such holder. At such hearing the accused may be represented by counsel, and shall be entitled to compulsory attendance of witnesses.

Three members of the board shall be a quorum for any such hearing. No permit shall be suspended or revoked except by the vote of three or more members of the board. (Italics ours.)

Thus if a registered pharmacist *owned* two stores, he could not conduct both. If he conducted one, he was compelled to have another registered pharmacist at the other and constantly in charge thereat.

If one not a registered pharmacist *owned* two stores, he could not conduct or take charge of either. He must have a registered pharmacist constantly in charge of each.

How will it help matters to say, as does the Act of 1927, that, though each store must still be in charge of and conducted by a registered pharmacist, the public will be better protected if the owner is a registered pharmacist, though he lives in Europe, and never sees the stores? We still await any logical or reasonable answer.

There are sundry other acts in Pennsylvania which provide that medicines containing narcotics shall be sold only on physicians' prescriptions (Act of July 11, 1917, Sec. 7; P. L. 758); that articles containing wood alcohol shall not be sold (Act of June 17, 1919, Sec. 1; P. L. 1031); that advertisement shall not be

made of articles relating to venereal disease (Act of April 21, 1921, Sec. 1; P. L. 242); that packages of caustic acid and alkalies for household use shall be properly labeled (Act of May 7, 1923, Sec. 1; P. L. 139), etc., etc.

The foregoing acts and regulations have been in effect in Pennsylvania for years before the enactment of the ownership act of May 13, 1927. The latter act is extraneous and without relation to the prior legislation, and can be declared unconstitutional without in any manner affecting the regulations above brought to this Court's attention.

III. The scope of the Act of May 13, 1927.

While the act is called a supplement to the act of May 17, 1917, which was the general act regulating the *practice* of *pharmacy*, establishing a licensing board, and providing for the licensing and registration of pharmacists, etc., yet it does not deal with the *practice* of pharmacy at all.

It deals only with *ownership* of drug stores. It neither repeals, amends or enlarges the comprehensive health regulations of prior legislation.

Let us analyse it: (See the act, pp. 11-13, *supra*).

What the act provides.

1. It forbids any but a registered pharmacist to own a drug store.

2. It forbids any corporation, association, or partnership, to own a drug store *unless all its members* are registered pharmacists.

3. It permits non-pharmacist owners, partnerships and corporations to continue to own what they now own but not to own new stores or stores at new locations.

4. It permits executors or trustees on whom such ownership devolves to own drug stores, though not registered pharmacists, as long as necessary to settle estates.

5. It permits anybody to own "a store" wherein proprietary and household drugs are sold in packages in which they have been put up by *pharmacists*, *manufacturing* pharmacists, *whole-*

sale grocers, or wholesale druggists. This kind of store cannot be called a "drug store."*

6. The penalties are severe,—$100 fine for every day of ownership contrary to the provisions of the act.

* A "drug store" or "pharmacy" is defined by the act of May 17, 1917, P. L. 208, thus:

"The term 'Pharmacy' when not otherwise limited, shall, for all the purposes of this act, be taken to mean a retail drug store or any place where drugs, medicines, or poisons are compounded, dispensed, prepared or sold at retail."

IV. The effect of the act.

1. *The act requires nothing of the pharmacist-owner.* It does not require the individual owner pharmacist to exercise any personal supervision over any of his pharmacies, or to supervise the compounding, preparation or dispensing of drugs, medicines or poisons. So far as its provisions are concerned he may give absolutely no personal attention to any of his pharmacies, and may even absent himself from the country during his entire period of ownership, provided his pharmacies are in charge of registered pharmacist employees as required by earlier legislation.* It contains no requirement that the stockholders, officers or directors, all of whom must hereafter be registered pharmacists, shall themselves engage in the active conduct of any drug store or pharmacy owned by their corporation.

2. The act in no wise regulates the sale of drugs. It is silent on this subject. This matter is already thoroughly regulated by existing law.

3. It does not say who shall compound drugs on physicians' prescriptions. This too is already regulated by existing law.

4. It does not say who shall purchase drugs for sale in the store. The pharmacist owner may employ a manager or clerk to do his buying who is not a

* See the act of May 17, 1917, *supra*, pp. 20-21, 23-24.

registered pharmacist. The standard of strength and purity of drugs and chemicals is already regulated by existing federal and state law.

5. It does not forbid or regulate adulteration or misbranding. This, again, is already covered by existing law.

6. Again, it permits the administrator, executor or trustee of the estate of the deceased owner of a registered pharmacy to continue to own and conduct it during the period for the settlement of the estate. But there is no requirement that such administrator shall be a registered pharmacist. This we contend conclusively establishes that the act is not an exercise of the police power. The Supreme Court of Pennsylvania, by its decision in the case of *Commonwealth* vs. *Zacharias*, 181 Pa. 126 (1897) has declared that such an exception, contained in a somewhat similar act regulating drug stores, was no protection to the public, was rank injustice to individuals, and was an arbitrary discrimination made between those who are equal under the law.

V. It is destructive of appellants' property rights to deprive it of the right to do business in any other cities or at any other locations than those in which it had units on May 13, 1927; and when such destruction is accomplished without any benefit to the public, this is a deprivation of property without due process of law.

A law forbidding the expansion of chain drug stores is not a health regulation, and is not a proper exercise of the police power.

While this *ownership* law is sought to be sustained on the broad ground of police power, the act has not a single attribute of a police regulation.

The Legislature obviously found nothing wrong with the ownership of drug stores by appellant or other corporations, not composed entirely of registered pharmacists. It found no offence nor evil which needed correction. On the contrary, it has expressly declared, by the very act in question, that the ownership of drug stores by such corporations is right and proper *to the extent that they now own such stores.* The business may be carried on by these corporations to any limit whatsoever in the stores they now own—they may supply all the medicines, etc., used in Pennsylvania,—*provided this is done in presently owned stores.* But they may not own any additional units for the transaction of their business.

The legislature has said that appellant's ownership of 28 stores is just, moral and beneficial to the public health of the community. But the ownership of

29 drug stores, it says, will be wrong and criminal. It has found no reason for prohibiting the appellant and other similar corporations, from owning drug stores; it is the *number* of stores they own which it finds wrong.

The *act in question declares proper* the ownership of drug stores by corporations in cities and at points where such stores are now located, but prohibits the same in other cities or at other locations. The ownership of drug stores by appellant in Philadelphia, Chester, York, Lancaster, Reading, Johnstown and Chambersburg is proper and right, but the ownership of a drug store by the appellant in Pottsville or in Hanover is a criminal act. The ownership by appellant of drug stores at 16 of the many hundreds of corners and business locations on the streets of the City of Philadelphia is innocent; but if appellant decides to conduct its retail drug business at 17 locations in Philadelphia, it is a law breaker, punishable by a fine of $100.00 per day for each day's ownership of the additional store.

This demonstrates that it is not the *ownership* of drug stores by corporations that is sought to be prescribed as a health measure, but the increase in the *number* of stores so owned, so that competition from such sources may be checked. Obviously the law is not a health regulation, but a trade regulation aimed at the expansion of a business which operates through a number of branches or units, commonly known as the chain system. This law might well be

entitled, in order to give it the name of the thing which it actually is, "An Act to Prevent the Expansion of Chain Drug Stores."

When, in 1916, appellant became domesticated in Pennsylvania, it entered—and was granted the privilege of doing business—for the purpose of transacting a retail drug business. Appellees admit (R. 67, par. 1) that "the plaintiff (appellant) since March 1, 1916, has been registered and qualified to carry on its business in the State of Pennsylvania, which business was stated in the application for registration to carry on business, to be the *conducting of retail drug stores.*"

Appellant thus acquired the right to carry on this business in one store or a dozen, or a hundred; at one location or many; in one city or town, or in all the cities and towns of the state. ***Appellant's business is a single business,*** although to secure volume, and for the convenience of the purchasing public, it operates through a number of units or branches, and takes its merchandise and its chemist shops to the places where people come to trade.

The right of conducting retail drug stores in Pennsylvania, specifically granted to appellant by the state, is now taken away from and denied to appellant as to all cities and towns, and as to all locations, where it had not stores on May 13, 1927, and as to any number of stores greater than 28.

The tremendous and telling effect of this deprivation,—and the relief to local drug store owners from

competition—will be immediately realized when certain census facts (as to which we assume the court will take judicial notice) are considered.*

The effect of this law upon appellant is therefore to deprive it after May 13, 1927, of great and valuable rights to transact business in Pennsylvania by taking away from it the right to own stores in any city or town where it has not now a branch store, or at any additional location in any place where it has a store.

Both the early and late decisions of this Court, establish that business is property and the right to do business is a property right. **Allgeyer vs. Louisiana, 165 U. S. 578 (1897); Pierce vs. Society, 268 U. S. 510 (1924); Hanover Fire Insurance Co. vs. Harding, 272 U. S. 494 (1926); Frost vs. Railroad Commission, 271 U. S. 583 (1926).**

Throughout this discussion it must be remembered

* The Federal census of 1920 gives Pennsylvania a population of 8,720,000. Therefore appellant, allowed 28 stores, is limited to one store to every 311,000 (approximately) of population. It shows (in addition to the thirteen cities and towns in which appellant has stores) more than 6,000 other cities, towns and villages, including 156 cities of five to one hundred and thirty-seven thousand. Among these are the following:

Allentown,	Shenandoah,	Dickinson City,	Pittston,
New Castle,	Bradford,	Greensburg,	Swissvale,
Homestead,	Charleroi,	Monessen,	West Chester,
Sharon,	Connellsville,	Phoenixville,	McKeesport,
Beaver Falls,	Farrel,	Sunbury,	Hazleton,
Carnegie,	Meadville,	Washington,	Shamokin,
Columbia,	Old Forge,	Harrisburg,	Ambridge,
Duquesne,	Steelton,	Dunmore,	Carlisle,
Mahanoy City,	Warren,	Oil City,	Coatesville,
North Braddock,	Scranton,	Wilkinsburg,	Dubois,
Punxsutawney,	Butler,	Canonsburg,	McKees Rock,
Uniontown,	Nanticoke,	Cheltenham,	New Kensington,
Bethlehem,	Washington,	Donora,	Plymouth,
Braddock,	Bristol,	Jeannette,	Tamaqua,
Lebanon,	Carrick,	Mt. Carmel,	Woodlawn.

The appellant is forbidden to go into any of these places, and is limited to one store in Pittsburgh, a city of 588,000 population.

that appellant complies and has always complied strictly with the laws and regulations of the State of Pennsylvania relating to the operation of drug stores. See the reply affidavit of the Attorney General (R. 54, pars. 4 and 6) and that of the Secretary of the Board of Pharmacy (R. 57, pars. 4 and 6), where it is stated that no act of appellant in violation of any of the provisions of the Public Health Act of Pennsylvania, and no conviction of any violation of the Public Health Act or any other law has come to the attention of the officials of the State in charge of enforcement of such laws. See also appellant's affidavits (R. 40, 46, 47, 52, pars. 3 and 16) where it is shown that each of the stores is under the personal supervision of a registered pharmacist, all prescriptions are filled by registered pharmacists, and that all of its business in Pennsylvania has been carried on in compliance with the public health laws of that state.

It happens to be an economic principle that the retail drug business is one to which the chain store method of distribution is peculiarly applicable, and in which the economies of that system find a ready field of operation. In these economies the public welfare is in every respect benefitted.

On account of the small size of the articles sold in drug stores, making it easy for the customer to carry his purchase, and by reason of the fact that the amount of the average sale is extremely small, making it convenient for the customer to pay out of change which he carries with him, the drug busi-

ness lends itself peculiarly to the cash and carry method of merchandising which constitutes one of the fundamentals of the chain store methods of distribution, and which eliminates the expense of deliveries and charge accounts.

Many of the articles sold in drug stores are commonly advertised articles manufactured at various places throughout the United States. These are purchased in quantity, directly from the manufacturers, without the intervention of jobbers or wholesalers (which has the double effect of saving the middleman's expense and profit and enabling the purchaser to secure the low prices resulting from large purchasing power) and assembled in warehouses for distribution to the retail stores. The central warehouse system, another of the fundamentals in the economics of chain distribution, is thus called forth. Merchandise in carload lots, instead of broken shipments at higher freight rates, is brought into warehouses, located at central distributing points, and thence distributed to local or nearby stores.

The cash basis on which business is done enables the chain store company to pay on a cash basis for its purchases, and thereby secure the discounts given by manufacturers for cash or ten day payments.

The central financial management and auditing system gives these stores the benefit of experienced executive work, and relieves the local store manager from the cares of leasing matters, bookkeeping, financing, bill paying, and a multiplicity of other

details, and enables him to concentrate his time and attention on his store and the service of his customers.

As is well known, the patrons of chain stores are those who are willing to carry their purchases and to pay cash, in order to secure the more moderate prices and increase the purchasing power of their earnings.

The chain stores have in general probably met the economic problems arising since the great war more efficiently than the individual retailer; and the individual retailer has been inclined, in accord with very natural human traits, to lay his failure to keep pace at the door of the chain stores. Under such conditions it is not unnatural that the numerous and not uninfluential individual retailers backed by the jobbers whose business is cut down by direct quantity purchases, should apply to the legislatures for assistance against the less localized, less numerous and politically uninfluential chain store dealers. This has resulted in a flood of legislation against chain stores.

In Maryland a law was enacted limiting the number of mercantile establishments, commonly known as chain stores, operated by any one corporation, in Allegany County, Maryland, to five, and assessing a tax of $500.00 for each store over one and up to five, although the owner of one store was to pay no such tax; and in North Carolina a like license tax was imposed on owners of six stores or more but not on owners of five stores or less.

The Allegany County law was declared unconstitutional in a well considered opinion in the case of **Keystone Grocery and Tea Company vs. William A. Huster, State's Attorney, No. 10,922, In Equity, Circuit Court of Allegany County, Maryland** (not yet officially reported but mimeographed copies of a certified copy of the opinion are submitted with this brief for the Court's convenience); and the North Carolina Tax Law was declared unconstitutional in the case of the **Great Atlantic & Pacific Tea Company vs. Doughton, Commissioner of Revenue in the Superior Court of Wake County, North Carolina** (not yet officially reported).

The following quotations from the opinion in the *Keystone Grocery and Tea Company* case are of interest:

> "It is not shown why the interest of the public, as distinguished from a particular class, requires that chain stores be regulated. The jobber and wholesaler may be interested in some form of regulation or elimination of competition, but the evidence does not show that the public have been damaged by chain stores or their methods of operation, and even if the welfare of the public demanded some form of regulation this Act wholly fails to provide any regulation at all. It is an Act to check and destroy, to eliminate competition in food stuffs rather than to promote competition in the interest of the general public, the consumers."

* * * * * * * *

"So it becomes the duty of the court to determine whether this statute, according to its terms, bears any relation to public order, security, health or morals. What is there in the terms of the Act that bears upon public order, security, health or morals? It does not undertake to regulate the store business. It is not directed against any of the practices alleged to be peculiar to the chain store business and charged to be objectionable. It recites in the title that the object is to limit the number of chain stores and to provide an additional license fee and penalties. Its purpose is not regulation, not correction of abuses and not the prevention of monopoly, but reduction of certain classes of stores (and raising revenue), of any conceivable size, conducted under any conceivable plan, for one organization in Allegany County. It permits the five chain stores to indulge in all the practices said to be objectionable, provided only five are guilty of such alleged offences. All of the five chain stores may be located in the City of Cumberland or of Fitchburg. They may be permitted to monopolize all the retail grocery business of the city to the selfish profit of the owner and without making any charitable contributions to the community. They may undersell and eliminate competitors and send to other places their profits; and yet they are perfectly free to develop into a monopoly if such a thing be possible by underselling their competitors and driving them all out of business."

* * * * * * * *

"Looking at the community as a whole, with the general knowledge of which the court takes judicial recognition, the chain stores, by purchasing direct from the manufacturer and the producer and eliminating the profits and expenses of the wholesaler, jobber and broker and the cost of delivery and selling for cash and thereby escaping the usual losses resulting from sales on credit, are more likely to give to the farmer, truckman and consumer part of the middle man's profit and so to become a blessing to society and the public generally. Indeed, the very elements so earnestly insisted upon by the defendants as a justification for this extra license fee are the very elements that would seem to justify the developments of the chain store."

* * * * * * * *

"Thirty years ago the country had numbers of dry goods and notion stores. These have all been displaced by the department stores in the larger towns, to the great advantage of the consumer, and yet no monopoly has been created. Freedom of trade without interference on the part of the state always develops competition and this will protect the consumer against the danger of monopoly. As the chain stores have developed in numbers, in resources, in capital and in efficiency, they have perhaps become essential for the efficient distribution of merchandise to the general public. Many of them are in the hands of great corporations whose stock is for sale on the stock ex-

changes and the curbs of great cities, and in the hands of a large number of our people who have invested therein their savings and share in their profits. It may be within the power of the Legislature and perhaps within its duty to regulate corporations dealing in the necessities of life, but it certainly is not within its power to single some of them out for destruction until they become a real menace to the public health, morals, order or security. There is nothing in the record that even remotely proves or tends to show that this Act bears any relation either directly or indirectly to the protection of the general public in their health, morals, good order, security or general welfare."

In Kentucky, a few years ago, a law taxing cash and carry stores as such, but not taxing other stores, was declared unconstitutional as class legislation: **City of Danville vs. Quaker Maid, Inc., 211 Ky. 677 (278 S. W. 98) (1926).**

In the drug trade the anti-chain store movement crystallized in the form of the "ownership" law as enacted by the Pennsylvania legislature in the Act of May 13, 1927.

The Maryland law declared unconstitutional in the decision above quoted resembles the Pennsylvania law under attack. But, instead of a limitation to five stores, applicable to all owners, the Pennsylvania law allows as many inequalities as there are chain drug store companies in Pennsylvania, allowing one

to a company having one store and twenty-eight to a company having twenty-eight stores, or 150 to a company having 150 stores on May 13, 1927.

The Pennsylvania law is also aimed more directly at large corporations, all of whose stockholders are not registered pharmacists, since it allows an individual pharmacist or a corporation composed of pharmacists to own a chain of a thousand or more stores and does not permit a corporation, not composed entirely of pharmacists, operating under identical conditions, to own any more stores than it had on May 13, 1927.

There is nothing in relation to the public health which requires that the expansion of chain drug stores be limited. Obviously, if chain stores are injurious to the public health, they should be prohibited altogether. The Legislature has expressly gone on record that such stores are quite innocent and proper, and that there is, so far as the presently owned stores are concerned, nothing detrimental or that needs correction. It is perfectly all right, so says this law, for the customer to procure his Scott's Emulsion, Listerine, vaseline or tooth brush, or to have his prescription filled, at any one of the appellant's 28 stores or the other chain drug stores in Pennsylvania; but, the State argues, it will injure the health of the customer if he procures his articles from a 29th store of appellant or an additional store of some other chain. It is all right for him to purchase from a store of appellant in Philadelphia or Chester but not from a store in Pottsville or Hanover.

The courts should not, it seems to us, place their stamp of approval upon a drastic piece of legislation of this character, making that unlawful which has heretofore always been considered innocent, and depriving persons of rights which they have heretofore possessed, unless there are weighty and substantial reasons showing that such action is necessary for the preservation of the public health.

The mind instantly comprehends, without setting it out in words, that the matter of *title* to the drug store property does not enter into the question of preservation of the public health, nor does the number of stores operated by chain store companies.

The humblest intelligence grasps the fact that the customer who purchases from the 29th store located in Pottsville, or has his prescription filled by the registered pharmacist in that store, has his health safeguarded exactly to the same extent as the customer who purchases from one of the 28 earlier established stores. It is the law regulating the filling of prescriptions and requiring that this shall be done by qualified pharmacists that gives the customer protection, regardless of who owns or does not own the store.

According to the decisions of this Court, the police power does not extend to the point of allowing the state to deprive one of private rights under the guise of a police regulation which has no bearing on the public health or safety.

* * * The courts are not bound by mere forms nor are they to be misled by mere pre-

tenses. They are at liberty—indeed, are under a solemn duty—to look to the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If therefore a statute purporting to have been enacted to protect the public health, the public morals or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution." **Mugler vs. Kansas, 123 U. S. 623 (1887), at p. 661.**

"* * * To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public, generally, as distinguished from those of a particular class, require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations." **Lawton vs. Steele, 152 U. S. 133 (1894), at p. 137.**

And, as Mr. Justice Holmes stated in the case of **Burnes Nat. Bank vs. Duncan, 265 U. S. 17 (1924), at p. 24:**

"* * * The States cannot use their most characteristic powers to reach unconstitutional results. Western Union Telegraph Co. *v.* Kansas, 216 U. S. 1, Pullman Co. *v.* Kansas, 216 U. S. 56, Western Union Telegraph Co. *v.* Foster 247 U. S. 105, 114.* * *"

Applying the test laid down in *Lawton* vs. *Steele*, *supra*, the first inquiry is, do the interests of the public, rather than those of a particular class, require interference with the ownership of drug stores by corporations not composed entirely of registered pharmacists? We feel that the answer is obvious.

The second inquiry is, are the means used reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals; or do they arbitrarily interfere with or place unusual or unnecessary restrictions upon private business?

Assuming that the end is the conservation of the public health, it is obvious that the public health is not protected by a requirement that the store where prescriptions are compounded and medicines sold shall belong to a licensed pharmacist, who is not required to do anything with reference to the store except exist as the owner; but that the public health is conserved by the requirement that, regardless of the ownership of the store, the medicines compounded on prescription shall be prepared by a qualified and licensed chemist in pharmaceuticals, and shall be of the proper standard as to strength and quality and not adulterated or misbranded.

It is an unreasonable restriction on private business to require that, in order for a corporation which has always owned drug stores to transact business at a different location, or in a new town, it must compel all its stockholders to become registered pharmacists, regardless of whether or not such stockholders have anything to do with the management of the business, the filling of prescriptions, or the sale of medicines.

VI. The ownership of drug stores by a particular class is not necessary to the preservation of public health; and the natural effect of the act is simply to give a monopoly of the retail drug store to pharmacists. This is not police regulation.

Long ago, the courts of Pennsylvania considered this matter and spoke as follows:

> **Commonwealth vs. Zacharias, 3 Pa. Super. Ct. 264 (1897) (affirmed 181 Pa. 126).**
>
> (P. 274) "The public are in no wise interested in the ownership of a drug store, or in its financial management. They are interested only in having that branch of its management affecting life and health—the sale of drugs, the compounding of prescriptions, etc.,—conducted by a properly qualified person."

This case dealt with the Act of May 24, 1887, as amended by the Act of June 16, 1891, providing that no person should carry on as manager in the state of Pennsylvania any retail drug or chemical store, nor engage in the business of compounding medicines or prescriptions of physicians, or of selling at retail any drugs, chemicals, poisons or medicines without being a registered pharmacist.

Zacharias, who was not a pharmacist, was part owner of three drug stores. He employed in the stores regular registered pharmacists for prescription and supervisory work, and did not himself put up any prescriptions. A conviction of Zacharias

under this statute was set aside on a number of grounds and in the concurring opinion of Judge Smith, the above language is used.

The Statute of 1887, prohibiting any person from managing a drug store except a registered pharmacist, came before the Supreme Court of Pennsylvania in **Commonwealth vs. Johnson, 144 Pa. 377 (1891).** Johnson was the owner of a drug store but was not a registered pharmacist. He employed a registered pharmacist to act as manager of the store. The court held that the "management" spoken of in the statute related to matters actually affecting the public health, and that Johnson was not engaged as manager within the meaning of the act and was not liable to its terms.

These decisions show clearly the recognition by the Supreme Court of Pennsylvania that there is a distinction between regulation of matters which do affect the public health and matters which do not affect the public health.

There is no question that the drug business is subject to proper regulation, but such regulation must actually have an effect upon the drugs themselves as prepared and delivered for use by the consumer, by relating to the quality of the drugs or to the qualifications of those who compound prescriptions, and not affect merely the question of ownership of title to a drug store.

It is quite proper that prescriptions of physicians should be filled by competent pharmacists licensed by

the state, as is provided by the act of May 17, 1917, as amended, and as has long been required, and also that the state should provide for the quality and standard of the drugs, as has been done in the Pure Drugs Act of 1909, as amended. These affect the commodities themselves as delivered to the consumer.

But the health of the consumer is not affected one way or the other by the matter of title to the drugs or the drug store. It makes no difference to the customer whether every stockholder in the Liggett Company, May Drug Company, People's Drug Company or any other company shall be a registered pharmacist or not. What he needs to be assured of is that the person who compounds his prescription regardless of who may be the owner of the store is a licensed chemist in pharmaceuticals. Not one iota of additional protection is furnished by the act in question, for the reason that this law merely grants a naked monopoly of the trade in drug store commodities.

The individual pharmacists have apparently been especially industrious in attempting to gain monopolies in the sale of commodities relating to the drug business. In four states they have sought to obtain the exclusive sale of proprietary medicines, so that the courts have been called upon to pass upon the constitutionality of statutes limiting to licensed pharmacists the sale of proprietary medicines, but not requiring of the pharmacist anything except that he be the person who has such right; just as the Penn-

sylvania law in question confers upon licensed pharmacists the sole right to own drug stores while requiring of the pharmacist nothing whatever except that he be the person who owns the store.

These cases are, **State vs. Donaldson, 41 Minn. 74 (1889); Noel vs. People, 187 Ill. 587 (1900); Saddler vs. People, 188 Ill. 243; 58 N. E. 906 (1900); State of South Dakota vs. P. E. Wood, 215 N. W. 487 (S. Dak.), (1927); State vs. Childs, 257 Pac. 366 (Ariz.) (1927).**

All of the arguments that could be offered for the drug store ownership law were urged in support of these statutes and in all of the cases the arguments were answered and negatived by the courts.

In the **Noel case,** (*supra*), which quotes at length from the Donaldson case, the court says (p. 593):

> "Undoubtedly the legislature has the right, under the police power, to pass enactments for the benefit and promotion of the public health. But it is well settled that the exercise of the police power must be limited to such measures as are designed to promote the public health, the public morals, the public safety, or the public welfare. City of Chicago *v.* Netcher, 183 Ill. 104. When it can be seen from the provisions of a statute that it has no tendency to promote the public health, safety, morals, comfort, or welfare, the courts are authorized to declare it invalid. It is unquestionably true that the state has as much right to regulate the sale of patent

and proprietary medicines and domestic remedies as it has to regulate the sale of any other kinds of medicines and remedies. But these patent and proprietary medicines and remedies are generally put up in sealed packages. In this form they can as well be sold by any person as by a registered pharmacist. The vice of the present pharmacy act is that it gives to the registered pharmacists the exclusive privilege of selling these patent and proprietary medicines and remedies, and excludes all other persons from doing so, while at the same time it makes no requirement of such registered pharmacists that they make any analysis, inspection, or examination of the same. In this regard the act gives to registered pharmacists a monopoly of the business of selling patent medicines, without in any manner protecting the public health. The public health is not protected by limiting these sales to registered pharmacists, who make no examination of what they sell.

"Counsel for the people claim that registered pharmacists are more likely to know the qualities of these patent medicines than other persons who are not registered pharmacists. But registered pharmacists will be as apt as other men to sell such patent medicines as there is a public demand for, when they are relieved of all responsibility for the character of such medicines, and are not required in any way to guarantee their

character, or adaptability to the cures which they claim to effect. * * *

"The views thus expressed are sustained by a decision made by the supreme court of Minnesota in the case of State v. Donaldson, 41 Minn. 74. In that case the supreme court of Minnesota, in commenting upon the provisions of an act similar to the pharmacy act of this state, say: 'The manifest purpose of the act was to protect the public against the mistakes and ignorance of incompetent and unskilled persons in the preparation and sale of drugs and medicines. * * * This is the expressed object of the general provisions of this act. They all look to the protection of the health and lives of the public by restricting the business of preparing and dispensing or selling drugs and medicines to those who have the requisite knowledge and skill on the subject. * * * Now, it is a matter of common knowledge that what are called 'patent' or 'proprietary' medicines are prepared ready for immediate use by the public, put up in packages or bottles labeled with the name, and accompanied with wrappers containing directions for their use, and the conditions for which they are specifics. * * * There is nothing that calls into use any skill or science on the part of the one who sells them. One man can do it just as well as another. * * * The fact that the seller is a pharmacist of itself, furnishes no protection

to the public. * * * Merely to limit their sale to pharmacists would furnish no protection to the public, without some further regulation as to inspection or analysis that would tend to exclude from sale those that might be injurious to health, or something requiring pharmacists to exercise their skill and science in determining the quality and properties of such as they sold. If we turn to our statute, we find an entire absence of any such provisions. * * * Had the act made pharmacists responsible for their quality, this might have had some tendency to protect the public.' After disposing of the suggestion, as being 'too uncertain and attenuated to be entitled to any weight,' that the mere fact of limiting the sale to pharmacists would tend to protect the public, because they would be more likely than others to know the qualities of patent medicines, the court then proceeds as follows: 'In the absence of some other regulations, a statute merely limiting the sale of patent medicines to a particular class would not and could not have any natural or reasonable tendency to protect the public. Such a law would not go far enough to amount to a police regulation. It would be merely giving a certain class of men a monopoly of the trade. This is not within the police power of the state. * * * A law enacted in the exercise of the police power must in fact be a police law. If it be a law for the protection of public health,

it must be a health law having some relation to public health. * * * If it is apparent on the face of the act that its provisions, from their very nature, cannot and will not conduce to any legitimate police purpose, it is the right as well as the duty of the court to pronounce it invalid, as in excess of legislative power, and an arbitrary and unwarranted interference with the right of the citizen to pursue any lawful occupation. According to the construction claimed for it, the provision of the act as to the sale of patent or proprietary medicines would be of just this character. It would be giving pharmacists a monopoly of the business, without in any manner protecting public health.' "

See, also, **Saddler vs. People, (Ill.) 188 Ill. 243 (1900).**

The reasoning of this case is precisely applicable to the situation here and the language might be paraphrased to say that "a statute limiting the ownership of drug stores to a particular class would not and could not have any actual or reasonable tendency to protect the public. Such a law would not go far enough to protect the public. It would be merely giving a certain class of men a monopoly of the trade."

There is every reason why the preparation and sale of medicines and poisons should be limited to competent pharmacists. There is none for limiting the ownership of drug stores to pharmacists. *There*

is no skill or science necessary to the ownership of property; one man can own property as well as another.

The language might further be paraphrased to say that "the vice of the drug store ownership law is that it gives to registered pharmacists the exclusive privilege of owning drug stores or chains of drug stores without requiring them to be in such stores, to supervise the stores, to fill prescriptions in the stores, to purchase the merchandise for the stores, or to do any other act or thing in connection with the stores."

An interesting state case along the lines of the question herein under consideration is **People vs. Ringe, 197 N. Y. 143 (1910),** where the court declared unconstitutional a statute limiting the right to engage in the undertaking business to those who are licensed embalmers. It was apparent that the only matter affecting the public health was the embalming of bodies, and that the public health was protected by requiring that embalming of bodies should be done by licensed embalmers, and that limiting the undertaking business of conducting funerals, management of funeral parlors and furnishing coffins, to licensed embalmers did not tend to protect the public health.

The court says (pp. 149, 151):—

> "A statute passed pursuant to the police power should be reasonable. Its real purpose must be to protect the public health, morals or general welfare. A statute cannot, under the guise of the

police power, but really to affect some purpose not within such power, arbitrarily interfere with a person or a property right. The statute under consideration unnecessarily interferes in several particulars with that liberty of person and property guaranteed by the constitution. * * *

"*We cannot refrain from the thought that the act in question was conceived and promulgated in the interests of those then engaged in the undertaking business and that the relation which the business bears to the general health, morals and welfare of the state had much less influence upon its originators than the prospective monopoly that could be exercised with the aid of its provisions.*

"We sustain the authority of the legislature to pass a statute to license and regulate the business of undertakers to protect the health, morals and general welfare of the state, but hold that the statute in question, so far as considered by us, is an unnecessary and unwarrantable interference with constitutional rights."

This was followed in **People vs. Harrison, 170 N. Y. App. Div. 802 (1915)**, where a like statute with somewhat different phraseology was held unconstitutional, and in the Massachusetts case of **Wyeth vs. Board of Health, 200 Mass., 474 (1909)**, where the court characterized such a statute as unreasonable and violative of fundamental rights.

Counsel for the appellees relied in the Court below upon the case of **Tucker vs. New York State Board of Pharmacy, 217 N. Y. S. 217 (1926),** as sustaining his contention that the Act of 1927 was a reasonable police regulation in the interests of the public health. This case was an application for an order of mandamus against the New York State Board of Pharmacy to direct that Board to transfer the petitioner's certificate to conduct a pharmacy. The petitioner had a registration certificate to conduct a pharmacy at Brooklyn, although he was not a licensed pharmacist. He was dispossessed from this store by certain legal proceedings, and stored the various merchandise from his drug-store for the purpose of removing the same to a new location when he acquired a new drug-store. Three months later he opened a drug-store at Hudson, New York, and removed the stored merchandise to this location.

The Board of Pharmacy refused to transfer his registration certificate to the new store under section 234 of the New York Public Health Law, which section provides:

> "* * * Every pharmacy shall be owned by a licensed pharmacist and every drug store shall be owned by a licensed druggist; and no copartnership shall own a pharmacy unless all the partners are licensed pharmacists and no copartnerships shall own a drug store unless all the partners are licensed druggists; except that any corporation, organized and existing under the laws of the state of New York or of

> any other state of the United States and authorized to do business in the state of New York and empowered by its charter to own and conduct pharmacies or drug stores, and, at the time of the passage of this act, still owns and conducts a registered pharmacy or pharmacies or a registered drug store or drug stores in the state of New York, may continue to own and conduct the same and may establish and own additional pharmacies or drug stores in accordance with the provisions of this article, but any such corporation which shall continue to own at least one of the pharmacies or drug stores theretofore owned by it or ceases to be actively engaged in the practice of pharmacy, shall not be permitted thereafter to own a pharmacy, or a drug store; and except that any person, not a licensed pharmacist or a licensed druggist, who at the time of the passage of the act owns a registered pharmacy or a registered drug store in the state of New York, may continue to own and conduct the same in accordance with the provisions of this article."

The main issue raised was whether or not the petitioner had ceased to be actively engaged in the practice of pharmacy and had therefore forfeited his right to own and conduct a drug store. The Court found that he had not abandoned his drug-store and that the Act permitted the removal of a drug-store from one location to another, the very thing that the petitioner was then doing. Accordingly it entered an order of mandamus.

The Court by way of *obiter dicta* stated that the

petitioner had questioned the constitutionality of the Act; and that "the practice of pharmacy is of such a nature as to permit its regulation by the Legislature. In enacting section 234 of the Public Health Law, I think the Legislature has adopted a reasonable legislation well within its authority under the Constitution." The Court assigned no reasons in support of this statement and obviously confused the practice of pharmacy with the ownership of a pharmacy or drug-store.

It is significant that the New York Act unlike the Pennsylvania Act of 1927 does not prohibit the expansion of chain drug-stores. So long as a corporation owns and conducts a drug-store at the time of the passage of the New York Act, it "may continue to own and conduct the same and *may establish and own additional pharmacies or drug-stores.*" Thus the New York Act fails to eliminate the competition of the chain drug-store; and this in all probability accounts for the more drastic terms of the subsequent Pennsylvania 1927 Act. In fact, the New York provisions are innocuous insofar as corporate drug-stores are concerned since they can expand *ad libitum*.

The New York Act, even more than the Pennsylvania Act, demonstrates that the corporate ownership of drug-stores is not a *malum in se*, which must be wiped out in the interests of the public health. The Pennsylvania Act tolerates corporate ownership insofar as it existed at the passage of the 1927 Act,

whereas the New York Act approves of the continued expansion of corporate ownership of drug-stores.

It is further significant that the New York Act, like the Pennsylvania Act, imposes no affirmative duties upon the pharmacist owner; and hence cannot possibly promote the public health and welfare. It is therefore open to all the objections raised in this brief to the constitutionality of the Pennsylvania Act of 1927.

VII. The Act cannot be sustained as a police regulation because of the lack of logical connection between its alleged object and the means adopted to accomplish that object.

This Court has laid down the principle that in a police regulation there must be a direct connection between the object sought to be accomplished and the means prescribed to accomplish the end: **Burns Baking Company vs. Bryan, 264 U. S. 504 (1924); Weaver vs. Palmer Bros. Co., 270 U. S. 402 (1926); Fairmont Creamery vs. Minnesota, 274 U. S. 1 (1927).** Any less salutary and sound method of admeasurement would do away with constitutional rights in this country.

The following text book statement, epitomizing the principle of the decided cases, may be helpful in fixing the mind upon the requirements of a police statute:

> "*Public good must be the object.* In order that a statute or ordinance may be sustained as an exercise of the police power, the courts must be able to see that the enactment has for its object the prevention of some offense or manifest evil or the preservation of the public health, safety, morals or general welfare; that there is some clear, real and substantial connection between the assumed purpose of the enactment and the actual provisions thereof, and that the latter do in some plain, appreciable and appropriate manner tend toward the accomplishment of the object for which the power is exercised." **12 Corpus Juris 929, Sec. 441-3.**

It is to be remembered that there is no complaint or charge that chain drug stores or corporately owned drug stores are detrimental to the public health, or that there is any evil to be remedied or condition to be corrected in respect to the ownership of drug stores by appellant or similar corporations whose stockholders are not all registered pharmacists. It is therefore difficult to discuss what object is sought to be accomplished (except the illegal one of eliminating chain store competition for the benefit of individual pharmacist owners, or corporations or partnerships all of whose members are registered pharmacists). Since, however, the act is labeled "a supplement" to a public health law we still assume that its professed object is the conservation of the public health.

There is a distinct hiatus between the assumed object—the preservation of the public health,—and the means prescribed for the accomplishment of the end,—that drug stores shall be owned by registered pharmacists. A law prescribing who shall hold title to a store tends in no wise to conserve the public health.

The Act does not demand that prescriptions be filled by registered pharmacists. This is done by the prior law of Pennsylvania. It does not require that the pharmacist owner supervise the store; that the medicines sold be of any particular standard; or that they shall not be adulterated or misbranded. It contains no requirement as to labeling of the medi-

cines, or with respect to the ingredients of the medicine or prescription. It does not require that the pharmacist owner spend any time in his store, or purchase the medicines or articles sold in the store, or hire pharmacists to compound medicines. It requires nothing whatever of him except that he exist as the owner of the store and that the title to the property shall reside in him. It allows him to spend all his time in Europe and yet own every drug store in Pennsylvania. It allows him to own one hundred stores but prescribes no duty on his part with respect to any of them.

How close the connection must be between the purpose of the regulation, and the means prescribed to accomplish the end, is shown by the cases recently decided by this Court.

In **Burns Baking Company vs. Bryan, 264 U. S. 504 (1924)**, the statute of Nebraska provided that bread should be sold in loaves weighing one-half pound, one pound, or multiples, with a two ounce tolerance. It was claimed that this was for the purpose of preventing imposition by short weight. The State Supreme Court held the regulation reasonable, as tending to prevent short weight, but this Court held that the matter of preventing short weight should have been dealt with directly. This Court said (pp. 513, 517):

> "Undoubtedly, the police power of the state may be exerted to protect purchasers from imposition by sale of short-weight loaves. Schmid-

inger v. Chicago, 226 U. S. 578, 588. Many laws have been passed for that purpose. But a state may not, under the guise of protecting the public, *arbitrarily interfere with private business, or prohibit lawful occupations, or impose unreasonable and unnecessary restrictions upon them.* Lawton v. Steele, 152 U. S. 133, 137, Meyer v. Nebraska, 262 U. S. 390 399. Constitutional protection having been invoked, it is the duty of the Court to determine whether the challenged provision *has reasonable relation to the protection of purchasers of bread against fraud by short weights, and really tends to accomplish the purpose for which it was enacted.* Meyer v. Nebraska, *supra;* Welch v. Swasey, 214 U. S. 91, 105; Dobbins v. Los Angeles, 195 U. S. 223, 236; Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 556; Lawton v. Steele, *supra.*

* * * * * * *

"*Imposition through short weights readily could have been dealt with in a direct and effective way.* For the reasons stated, we conclude that the provision that the average weights shall not exceed the maximums fixed is not necessary for the protection of purchasers against imposition and fraud by short weights, and is not calculated to effectuate that purpose, and that it subjects bakers and sellers of bread to restrictions which are essentially unreasonable and arbitrary, and is therefore repugnant to the 14th Amendment." (Italics ours.)

In the instant case it cannot be shown how the limiting of ownership of drug stores to registered pharmacists will protect the public health.

Only one suggestion has been made along this line, which is found in the opinion of Judge Dickinson who suggests (R. 82) that it *may be* that the legislature *thought* that an individual pharmacist owner *might* purchase drugs with greater regard to quality than to price. Incidentally, reasoning of this sort would authorize the legislatures to put corporations out of the grocery business and out of the clothing business and out of the manufacturing drug business and out of every other business on the ground that the legislature *might* think that individuals *might* give a greater regard to quality than to price.

Is it not an adequate answer to this suggestion that there is nothing in the drug store ownership law which deals with the quality of drugs, or requires the pharmacist owner to give a greater regard to quality than to price? The matter cannot, under the principle of the decided cases, be dealt with in an indirect fashion. And this must be especially true when even the asserted indirect method does not relate to the matter except by a remote speculation based on a double subjunctive raising a conjecture which may as well be false as true. The language of the *Burns Baking Company case* is precisely applicable here.

Imposition through lack of quality of the drugs is already fully provided against in the Pure Drug

Law of 1909, as amended and if still more stringent provisions are needed, the matter could be readily dealt with in a direct and effective way. The provisions that drug stores shall be owned only by registered pharmacists is not necessary for the protection of purchasers against imposition and fraud by lack of quality, and is not calculated to effectuate that purpose. The effect of the act is merely to subject corporate owners to restrictions which are essentially unreasonable and arbitrary and therefore repugnant to the 14th Amendment.

In **Weaver vs. Palmer Bros. Co., 270 U. S. 403 (1926),** a statute of Pennsylvania forbidding the use of shoddy in comfortables was considered. It was claimed that the object of the statute was to prevent the use of *unclean* shoddy. It was shown that sterilization would render shoddy fit for use but the state claimed the right under the police power to prohibit the use of all shoddy, new and old, sterilized and unsterilized, in order to prevent the use of shoddy which might not have been properly sterilized. This Court held this an arbitrary use of the legislative power, saying (p. 415):

> "The constitutional guaranties may not be made to yield to mere convenience. Schlesinger v. Wisconsin, ante, 240. The business here involved is legitimate and useful; and, while it is subject to all reasonable regulation, the absolute prohibition of the use of shoddy in the manufacture of comfortables is purely arbitrary and violates the due process clause of the 14th

Amendment. Adams *v.* Tanner, 244 U. S. 590, 596; Meyer *v.* Nebraska, 262 U. S. 390; Burns Baking Co. *v.* Bryan, 264 U. S. 504."

It will be seen that in the *Weaver case* this Court held the statute must have an immediate connection with the object sought to be accomplished. The state could have prohibited the use of unclean or unsterilized shoddy, but it could not reasonably prohibit the use of all shoddy because this interfered with private rights without directly getting at the evil sought to be suppressed.

What evil is sought to be suppressed by the law under discussion nobody knows, although we suspect that it is competition of more efficient agencies of distribution of drug store commodities; but if there were any evil (which manifestly there is not, since it is nowhere mentioned or specified) it should be specified and prohibited by legislation bearing directly on the suppression of the evil; not by making that criminal which is innocent and thereby depriving individuals and corporations of their business rights, so as to give a monopoly of the business to individual pharmacists. Taking away existing business rights in such a fashion is deprivation of property without due process of law.

A suggestion of the Attorney General on argument was that this law would enable the authorities to deal more effectively with violators of the drug laws; that an employed pharmacist might say, "my superior told me to do this" and the superior, not a registered

pharmacist might say, "I didn't know the law." Counsel for the State seem to lose sight of the fact that this would apply as well to pharmacist owners as to non-pharmacists and also of the fact that neither the ignorance of the law nor the direction of the superior would excuse either employer or employee. For violations of the law the corporate owner, its officers and the violating pharmacist or employee could all be prosecuted; and in addition the drug store license could be taken away from the company and the pharmacist's license could be taken away from the pharmacist under the existing laws of the State.

As to this argument there is no business on earth to which it would not apply and all corporate enterprises, and indeed the transaction of any business whatsoever by principal and agent, would be subject to regulation and prohibition on the same theory.

The State Board of Pharmacy is given full powers to employ chemists, inspectors, agents and attorneys, to investigate and prosecute under the public health and pure drug law (Act of May 8, 1909, P. L. 470, Sec. 5 and 7; Act of May 17, 1917, P. L. 208, Sec. 2 and 11). These agents and inspectors may enter any drug store and take samples that tests may be made to determine whether the drugs conform to standard, or are adulterated or misbranded (Act of May 8, 1909, P. L. 470, Sec. 5); and district attorneys are specifically charged with the duty of promptly instituting prosecutions. If still stronger

laws were needed the legislature could impose penitentiary terms for violations. But any enforcement laws should bear equally upon all the owners, pharmacists and corporations not composed of all pharmacists, and such a matter should not be attempted, and is not attempted, we think, by a law confining the right to own stores to pharmacists.

Appellant and its pharmacist employees have not violated the laws of the State relating to the compounding and sale of drugs, as the appellees themselves admit in their answer and affidavits. But if there were violations by corporate owners or in corporate owned drug stores, they could be as easily dealt with as violations in stores owned by individual pharmacists or corporations or partnerships composed of pharmacists; and if the law was intended to deal with violations then it seems that it should be directed to violations and not to ownership of property.

It has long been established that constitutional rights cannot be made to yield to mere convenience. **Schlesinger vs. Wisconsin, 270 U. S. 230 (1926); Weaver vs. Palmer Bros. Co., 270 U. S. 402 (1926); Adams vs. Tanner, 244 U. S. 590 (1917).**

Reasoning along the line suggested by the Attorney General would justify the taking of property and business rights of perfectly law abiding corporations and individuals against whom there had never been any occasion to enforce any laws.

In **Fairmont Creamery vs. Minnesota, 274 U. S. 1 (1927),** a statute prohibited creameries from paying

more for cream in one locality than in another. The state claimed that this was intended to prevent high bidding by strong buyers for the purpose of destroying competition. This Court inquired as to whether the state might, in order to reach such an evil, inhibit the plaintiff in error from carrying on its business in the usual manner theretofore regarded as both moral and beneficial to the public and reached the conclusion that evils are to be suppressed by legislation dealing directly with the subject matter and comporting with the Constitution and not by such as strikes down essential rights of private property.

This Court says (pp. 9, 10, 11):

> "The real question comes to this. May the state, in order to prevent some strong buyers of cream from doing things which may tend to monopoly, inhibit plaintiff in error from carrying on its business in the usual way heretofore regarded as both moral and beneficial to the public and not shown now to be accompanied by evil results as ordinary incidents? Former decisions here require a negative answer. We think the inhibition of the statute has no reasonable relation to the anticipated evil—high bidding by some with purpose to monopolize or destroy competition. Looking through form to substance, it clearly and unmistakably infringes private rights whose exercise does not ordinarily produce evil consequences, but the reverse.

"In Adams *v.* Tanner, 244 U. S. 590, 594, this court said: 'Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skilfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked.

"Concerning a price-fixing statute, Tyson & Bros. *v.* Banton, 273 U. S. 418, recently declared: 'It is urged that the statutory provision under review may be upheld as an appropriate method of preventing fraud, extortion, collusive arrangements between the management and those engaged in reselling tickets, and the like. That such evils exist in some degree in connection with the theatrical business and its ally, the ticket broker, is undoubtedly true, as it unfortunately is true in respect of the same or similar evils in

other kinds of business. But evils are to be suppressed or prevented by legislation which comports with the Constitution, and not by such as strikes down those essential rights of private property protected by that instrument against undue governmental interference. One vice of the contention is that the statute itself ignores the righteous distinction between guilt and innocence, since it applies wholly irrespective of the existence of fraud, collusion or extortion (if that word can have any legal significance as applied to transactions of the kind here dealt with; Com. *v.* O'Brien, 12 Cush, 84, 90), and fixes the resale price as well where the evils are absent as where they are present. It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrong-doers also may be caught.' And see Adkins *v.* Children's Hospital, 261 U. S. 525; Wolff Co. *v.* Industrial Court, 262 U. S. 522, 537.

"The State also relies upon Otis *v.* Parker, 187 U. S. 606; Purity Extract Co. *v.* Lynch, 226 U. S. 192; Rast *v.* Van Deman & Lewis, 240 U. S. 342; and Merrick *v.* Halsey & Co., 242 U. S. 568. But all those cases recognize the duty of the court to inquire into the real effect of any statute duly challenged because of interference with freedom of contract guaranteed by the 14th

Amendment, and to declare it invalid when without substantial relation to some evil within the power of the State, to suppress, and a clear infringement of private rights."

It will be noted that if the reasoning of the Court below and of the Attorney General were applied to the cases above referred to, the legislature of Nebraska, in order to prevent imposition by short weight, could have prohibited corporations from owning bakeries on the conjecture that individuals might give greater regard to accurate weight than corporations. The legislature of Pennsylvania, in order to prevent the use of unsterilized shoddy, could have prohibited corporations from engaging in the manufacture of comfortables on the theory that individuals might give a greater regard to sterilization than corporations; and the state of Minnesota, in order to prevent strong buyers of cream from paying more in one locality than in another could have prohibited corporations from engaging in the business of purchasing and selling cream on the theory that this would tend to monopoly and individuals might be less likely to do things tending to monopoly than corporations.

Certainly the rule that in legislation which affects business rights there must be a direct, logical and substantial connection between the object sought to be accomplished and the means prescribed to accomplish the end may not be departed from simply because the person whose rights are taken away happens to be a corporation.

VIII. The Act denies to the appellant the equal protection of the law.

It is settled that a corporation is entitled to the benefit of the equal protection clause of the Fourteenth Amendment. It is settled that the amendment is a guarantee of the protection of equal laws.

Of course a state may adjust its legislation to differences in situation but the classification must be reasonable, not arbitrary. It must rest upon distinctions having a fair and substantial relation to the object sought to be accomplished by the legislation. **Truax vs. Corrigan, 257 U. S. 312 (1921), Kentucky Finance Corporation vs. Paramount Exchange Corp., 262 U. S. 544 (1923); Atkinson T. & S. F. R. R. vs. Vosburg, 238 U. S. 56 (1915).** Persons circumstanced alike, whether corporations or individuals, must be treated evenly and equally.

The Act of 1927 does not bear equally upon the appellant and upon individual pharmacists or partnerships or corporations composed of pharmacists, operating one or more stores. Under its terms the appellant may own the 28 stores which it had on May 13, 1927, but no more. It may transact its business at the locations which it had on that day, but no others. It may reach with its 28 stores such portions of the 8,700,000 people of Pennsylvania as 28 stores will reach, but it cannot transact its business through 29 or more stores or make its stores available to more people. It may stay in the 13 cities where it is now located, but may not go into a 14th city or to any

other of the more than 6000 cities and towns of Pennsylvania.

An individual pharmacist or a corporation or partnership composed of pharmacists, competing with the appellant's business, may do all of these things, may own a thousand or an unlimited number of stores in Pennsylvania; it may go on every block in Philadelphia, and upon every street in every city in the state; may seek to reach with drug stores all of the population.

The appellant cannot do a volume of business in Pennsylvania larger than can be done in 28 stores. The individual pharmacist owner or the partnership or corporation composed of pharmacists, competing with appellant may do all the business that a hundred or a thousand stores can do.

The equal protection of the laws—the protection of equal laws—is taken away from the appellant by the act.

An illustration of the inequality and injustice of the act is the following. The average drug store employs, say two pharmacists, and has from 6 to 20 other employees. Under the act the other employees, those who handle proprietary medicine, hospital goods, candy, cigars and soda water, the bookkeepers and other help in the store, may not own a part interest, as partner or stockholder in the business, to the success of which their efforts contribute, nor may a registered pharmacist engage in the business with the cigar manager and soda manager as partners, or co-stockholders.

The pharmacist owner may hold shares of stock or an interest in railroads, though not licensed to operate engines; in ships, though not a licensed pilot or master seaman; in taxicab companies, though not a licensed chauffeur; and in all other instrumentalities of production, manufacture and distribution. He alone may also hold shares in drug stores and drug companies. No other member of the public has such a right.

This law bears with cruel inequality upon a corporation situated as the appellant is, which necessarily cannot require that all persons who at any time may be owners of its capital stock shall be registered pharmacists. For a partnership or corporation composed of registered pharmacists, in competition with appellant, may have all the benefits of the chain store system (which reduces its overhead expense as the number of stores is raised and the volume of business increased), and may operate stores exactly as the Liggett Company operates its stores, employing for the preparation of medicines in the prescription departments licensed pharmacists, exactly as does the Liggett Company; may have a store in every one of the cities, towns and villages of Pennsylvania; may open a store at any desirable location on any street in any city or town; while the Liggett Company is restricted to the towns and locations where it now has stores and to the volume of business which it can get in its present stores.

There is no distinction whatsoever as to the methods

of operation or otherwise, between a chain of drug stores owned by a pharmacist, or a partnership or corporation composed of pharmacists, and one owned by a corporation, the holders of whose capital stock are not all registered pharmacists, yet the right to own such stores and chains of stores, unlimited as to number, community or location, is granted to the former and denied to the latter. This is not the equality guaranteed by the Federal Constitution; for it does not meet that standard of evenness and fairness with which the laws of the state should bear upon all within its jurisdiction, according to the just principle of the constitution, as interpreted by this Court, that all are entitled to the protection of equal laws.

IX. The ownership of property is not a profession. The practice of pharmacy is not, properly speaking, a profession, but if it is, that fact does not justify depriving corporations of business and property rights merely because a certificate of competency is required of the corporation's employee pharmacists.

The retail drug business, as its very term imports, *is a mercantile business,* dealing in commodities of common use and necessity, with a manufacturing aspect in one particular, namely, that certain medicines are prepared in a chemist's shop on the premises, from specific formulae set forth in writing in prescriptions of physicians.

Such medicine is made up, packaged, labeled and sold on individual order, and in this way only does it differ from proprietary medicines or common household drugs, which are made up in quantity, from a general formula, and packaged and labeled at an establishment away from the drug store. For instance, a doctor might (as they formerly did) write a prescription for twelve tablets of five grains each of monoacidester of acetyl salicylic acid, with directions for taking for a cold, or to reduce temperature. The pharmacist would make up the same product which is now sold in already prepared form as "aspirin," but the cost to the patient would be higher, and he could not get it as quickly. Nowadays the physician would simply tell the patient, nurse or mother to get a package of five grain aspirin

tablets, with instructions as to how often they should be taken.

There would seem to be no more reason to limit the ownership of drug stores to the chemist working in the drug store than to the chemist working in the manufacturing laboratory.

The pharmacist's relation to the retail drug store is that of manufacturing chemist when filling prescriptions, and salesman when selling the manufactured article, or other drugs or articles, to the customer.

The Attorney General, however, propounds the theory that the practice of pharmacy *is a profession,* which may be limited to one who qualifies himself. There is no doubt that the state can require the person who compounds medicines to have the proper chemical knowledge and training and to demonstrate this by securing a certificate of competency, and becoming registered or licensed, and the state may make it unlawful for unqualified persons to do this work, thereby confining the compounding of prescriptions to licensed pharmacists. This exclusive privilege the pharmacist undoubtedly has and is entitled to.

Whether a pharmacist is a professional man or not is aside from the question, although he is not generally so understood to be, this term being usually limited, in common understanding, to the doctor, lawyer or minister, and other like callings embracing a wide degree of cultural knowledge, and the exercise of which involves personal discretion and judgment,

rather than mechanical knowledge of how to put together certain chemicals. The mere fact of being licensed does not make of a calling a profession, else this would make professional men of chauffeurs and all who drive automobiles, aviators, railroad engineers, masters, mates and engineers of vessels, men who run stationary engines and boilers, and numerous others who follow occupations where incompetency in handling dangerous instrumentalities would jeopardize the safety of the public, and as to which proficiency must be demonstrated by the securing of a license.

The argument of the Attorney General then proceeds that since the exclusive privilege of *filling prescriptions* is given to pharmacists, the state may go on and give the exclusive privilege of *owning drug stores* to pharmacists. In other words, the Attorney General argues that because pharmacy has some aspects of a profession in that certain knowledge and experience is required to compound chemicals, the ownership of drug stores is a profession. Of course it is clear that whether pharmacy is or is not a profession, the *ownership* of drug stores or any other species of property certainly is not a profession. The argument is an egregious *non-sequitur*.

As suggested by the court in the **Zacharias case** (*supra*, pp. 31, 47), there are many matters of ownership and management of a drug store in which the public has not the slightest concern. There are matters of leasing property, negotiating with landlords, banking, borrowing and paying money, paying bills, paying employees, keeping books, buying fixtures and equip-

ment, advertising window displays and innumerable other details of executive and financial management. It is not necessary that a pharmacist shall handle these details; it is only necessary that a pharmacist shall prepare and dispense physicians' prescriptions and supervise that part of the business which relates to special medicinal preparations not already packaged and ready for sale. To be a pharmacist requires only the knowledge of pharmaceuticals and their combination into medicines; to engage in the business of owning drug stores and selling drugs and drug store merchandise requires other things.

The State attempts to draw an analogy between the practice of law and medicine and the ownership by pharmacists of drug stores. In the case of both doctor and lawyer a personal relation is involved, a personal service is rendered and paid for. The case of a pharmacist filling a prescription is entirely different. The customer brings to the store a prescription written by a physician calling for certain chemicals to be compounded into a formula as ordered by the doctor. There is no personal examination by the pharmacist of the condition or symptoms of the patient, no inquiry into his affairs. The pharmacist and customer need never see each other. The prescription could be transmitted through a third person, or by mail. The pharmacist is merely to go through the mechanical detail of weighing or measuring the proper amounts of the medicines or drugs, compound them chemically as ordered, place them in a receptacle,

transcribe to the label the directions for taking as ordered by the physician, fix a price for the merchandise so manufactured and give or send it to the customer, collecting a price for the article so manufactured. If the prescription is perfectly filled, the function is mechanical and ministerial, involving no discretion.

There are hundreds of other businesses in which especially trained persons are required to conduct some of the details. A ship's engineer, a ship's pilot and a ship's captain must be specially trained and licensed; yet there is no reason why the owner of a steamship or stockholders in a steamship line should be pilots, engineers or navigators.

A taxicab or automobile must be driven by a licensed chauffeur yet there is no reason why the ownership of a taxicab company or an automobile should be limited to licensed chauffeurs. Similar instances might be multiplied without number.

As a concomitant to this "profession" theory, the State argues that the act, by its last exception, only affects a small portion of the drug store business, that is to say, the prescription department.

The language of the exception is:

> "Provided that nothing in this section shall be construed to affect the ownership by other than a registered pharmacist of a store or store wherein the *sale* or *manufacture* of medicines is limited to proprietary medicines and commonly used household drugs. Provided such commonly used household drugs are offered for sale to con-

sumers in packages which have been put up by pharmacists, manufacturing pharmacists, wholesale grocers or wholesale druggists." (Italics ours.)

According to this, one may have a store in which pharmacists (or even a wholesale grocer or wholesale druggist) may manufacture and put up in packages, commonly used household drugs. But one may not have the pharmacist who puts up the commonly used household drugs also put up medicines on physicians' prescriptions. The pharmacist is not practicing a profession if he makes up aromatic spirits of ammonia, castor oil, or bicarbonate of soda on the direction of the store owner, or customer, but he is practicing a profession if he does so on the written direction of a physician!

There are many medicinal preparations, neither commonly used household goods nor proprietaries, sold on call and not on prescription, including practically all newly developed preparations, which could not be sold except by pharmacists until they became commonly used or proprietaries were developed from them.

The theory that the law is valid under the police power because only a small portion of the business is affected is put forward by the state, to the extent of carrying it in its answer (R. 71, par. 32) and its affidavit (R. 55, par. 10), where it is stated that the only portion of appellant's business affected by the act is the prescription business amounting to only

5% of the total volume of business. We do not understand that because a law may cut off only part of a man's rights it thereby becomes constitutional.

The appellant's prescription business in Pennsylvania in 1927 (as shown by the affidavit of John S. Alley, R. 63) amounted to $163,487.40 or approximately .064% of the business. But according to Mr. Alley's affidavit, and it is the only testimony on the subject and is undisputed, and according to common knowledge and experience, the prescription business constitutes a vital part of the conduct of a drug store, and a great deal more of the volume of business than the prescription business would be cut away by eliminating the prescription department.

The undisputed testimony shows that purchasers who go to drug stores for prescriptions, purchase many other articles of hospital, sick room and household use; that any attempt to conduct a store which is not in the true sense a drug store, in that it makes up and sells prescriptions, will necessarily result in a very large decrease of the business of such store; and that a drug store, as the same is commonly understood in practice in the United States today, is a place where the members of the public purchase prescriptions and medicines, and also other articles commonly carried in drug stores for sale (R. 63).

The appellant has always conducted drug stores with prescription departments and has no machinery for operating stores without prescription departments.

It employs more than 1200 pharmacists and assistant pharmacists, from whom are developed its store managers. Its purchase of medicines, chemicals and drug store articles is tied up with the purchase of articles and materials which go to the prescription department. For twenty years it has been operating its stores with a system built around the prescription, hospital and medicine department. Its entire system would have to be rebuilt and it would be pushed out of the drug business and into something which is not the conducting of retail drug stores if deprived of the right to have prescriptions filled in its stores; such filling of prescriptions being merely the manufacture of the medicine by hand in a chemist's shop at the back of the store. Its loss of prestige and custom would be incalculable if its stores could not function as drug stores and with prescription departments, supplying all of the articles which drug store customers normally require.

Stores without prescription departments could not be called drug stores under Section 15 of the Act of May 17, 1917, providing that it shall be unlawful for any person, firm or corporation to conduct or transact business under a name which contains as part thereof the words "drug store," "pharmacy," "medicine store," "medicine shop" or "drug shop," or in any manner by advertisement, circular, poster, sign, or otherwise describe or refer to the place of business by the terms, "drug store" or "pharmacy" or any other term having a similar meaning, unless the place of business is a drug store or pharmacy,

duly registered and authorized by the State Board of Pharmacy. No drug store could be registered under the Drug Store Ownership Law unless it were owned by a pharmacist; therefore no matter how much proprietary medicines and other articles commonly carried in drug stores might be sold without a prescription, the place of business could not be called a drug store or medicine store. The appellant corporation has always used the name "Liggett's Drug Store" and would lose an immensely valuable portion of its good will by being deprived of the use of such name. Moreover, it is common knowledge that the customer at the prescription counter is a customer for other departments of the store, especially allied ones like the medicine or hospital department.

The prescription business done by the average pharmacist owner in each store is about the same as that done by the Liggett Company, namely around 6%, the rest of his business being in proprietary medicines and other articles. But the establishment is not a drug store under the law or in fact unless it has a prescription department; and this is a business in which the Liggett Company is engaged, for which it was chartered, and for which it is authorized in the State of Pennsylvania. The individual pharmacist competitors of the Liggett Company have prescription departments although the average of them do no more prescription business, in proportion to their other business, than the Liggett

Company; and there is no reason why they should be able to own drug stores and operate them through pharmacists than there is that the Liggett Company should do precisely the same thing.

Of course, it is obvious that limiting the ownership of drug stores to pharmacists only when there is a prescription department in the store no more tends to conserve the public health than the limitation to pharmacists of the ownership of any other kind of store, and the exception does not save the law from the hiatus that exists between the ownership of a drug business and the preservation of the public health. There is still nothing that requires the pharmacist owner to fill prescriptions, or have prescriptions filled by a pharmacist, buy good drugs, or himself purchase any drugs, or give any attention to the store.

It is to be remembered that the state finds nothing wrong with the ownership of drug stores, with prescription departments, to the number that such stores were owned on May 13, 1927.

It cannot be said that the health of a part of the people of Philadelphia will be jeopardized by going to a new Liggett store for their prescriptions and medical needs, to the extent that it is necessary to forbid the ownership of such a store, but that the health of the other part of the commodity who go to the presently established stores is not so jeopardized.

These two things are inconsistent and show that

no necessity exists for limiting the ownership of drug stores to pharmacists, and consequently such a measure is not a police measure.

Who is benefitted by a law limiting the ownership of drug stores containing prescription departments to pharmacists? Not the customer, for he cares not who owns the store, and is not interested in that phase of the matter, so long as his medicine is compounded by a competent pharmacist, owner or employee. Not the pharmacist who wants to work for a corporation owning a store and does not wish himself to take on the duties or responsibilities of proprietor. Not the other drug store employees, who are prohibited from ever owning any interest in the business they work for. Not the investor who is prohibited from putting his earnings into a drug store company unless he qualifies as a pharmacist.

There is only one person who receives such benefit,—the present pharmacist owner and corporation composed of pharmacists owning a drug store or stores, who is freed of competition by chain drug companies not composed solely of pharmacists at all places where they had no locations on May 13, 1927.

X. Errors in the opinion of the Court below.

Some space must be given to a discussion of the opinion of Judge Dickinson which, as will be noted, is lamentably replete with errors and misconceptions.

(*a*) A misleading statement occurs at the very outset of the opinion where, after saying that the Pennsylvania Legislature has passed a series of acts having a more or less direct bearing on this litigation, Judge Dickinson continues:

> "The beginning may be said to be the Act of May 17, 1917." (R. 78.)

This might lead one to think that only since 1917 has the state had laws regulating the sale of drugs. This would imply that it was only because of lack of regulation that corporations and persons other than pharmacists were allowed to engage in the retail drug business.

As shown by **Commonwealth vs. Johnson (supra)**, the state, since May 24, 1887, provided by law that pharmacists, in order to compound and dispense medicines, shall obtain a certificate of competency from the State Pharmaceutical Examining Board and shall be registered; and that no person shall compound medicines or prescriptions of physicians except a registered pharmacist.

With this safeguard as to only that portion of the general miscellaneous business of drug stores which has a bearing on the preparation of the drugs, it has long been recognized that the business may be owned and conducted by corporations and individuals

not pharmacists, with no detriment, but to the distinct benefit of the community. Accordingly appellant and other corporations, both foreign and domestic, have long been freely granted the right to engage in the retail drug business and own drug stores.

The act of May 26, 1921, P. L. 1172 expressly provides for the granting of registration of drug stores to corporations, and all of the acts are applicable to "persons, firms and corporations."

The act of 1887 was amended on June 16, 1891, as shown by the case of **Commonwealth vs. Zacharias, 3 Pa. Super. Ct. 264 (181 Pa. 126)**, and has been revised and amended from time to time; and the Act of May 26, 1917, is simply a revision of general regulations which have been in effect for forty years or more.

In addition to this, the Pure Drug Law of Pennsylvania (*supra*, p. 17) providing that drugs shall not be adulterated or misbranded and shall be of U. S. Pharmacopoeia standard as to strength and quality, was adopted in 1909. This Act is one which is amended from time to time so as to provide that the latest revision of the U. S. Pharmacopoeia shall be the official pharmacopoeia. The last amendment is in 1927 (*supra*, p. 19) and provides that the *tenth* revision shall be the official pharmacopoeia.

The beginning, therefore, is not in 1917, as Judge Dickinson indicates. Decades before that, the state had laws and regulations to protect the public health,

under which drug stores have been permitted to be owned, in whole or in part, by others than registered pharmacists, or corporations or partnerships wholly composed of pharmacists, and such ownership has not been found to affect the public health in any way.

The Act under attack, although labelled a part of the Public Health Law, is an unrelated piece of legislation having to do with the ownership of property, and not in any way regulating drugs or the conduct of drug stores.

(*b*) One of the most serious of Judge Dickinson's apparent miscomprehensions is found on page 81 of the Record.

After going into the matter of jurisdiction and finding that the court has jurisdiction, he says:

> "This takes us back to the question of whether we are prepared to find that the public has no concern in the business of a drug store or the calling of a pharmacist."

This is not the question involved in this case at all. It is conceded that the drug business is one which has long been recognized as subject to regulation and there is no doubt that the public is concerned in the business of a drug store and in the calling of a pharmacist *so far as the same relate to those matters that are connected with the conservation of the public health.*

In the case of **State v. P. E. Wood, 215 N. W. (So. Dak.) 487 (1927),** (quoted from more fully hereafter)

which declared unconstitutional a statute giving the sole right to registered pharmacists to sell proprietary medicines, the court says (p. 488):

> "* * * And it is not a particularly modern view that the public is entitled to protection in health against fraud, misbranding of goods and the unregulated sale of dangerous and poisonous medicines. This principle is old and it is well established that the state may protect the public by wholesome and effective laws. No argument is necessary to induce this court to uphold any valid exercise of the police power of the state, so protecting the public.
>
> "The vital question is, will this act accomplish what is claimed for it? Both the briefs of appellant and of the Amicus Curiae seem to assume that restricting the sale of such medicines to registered pharmacists will protect the public from all the ills that might result from unrestricted sale. But they do not point out how the public are protected."

In State vs. Childs, 257 Pac. (Ariz.) 366 (1927), also declaring unconstitutional a statute seeking to limit the sale of proprietary medicines to pharmacists, the court says (370):

> "We do not wish it to be understood that we hold the power of the Legislature to legislate in regard to the sale of drugs, medicines or poisons is denied. On the contrary, we think all reasonable provisions protecting the health and safety of the public by regulating the prescribing, compounding and dispensing of such articles are highly commendable and should be

> encouraged, but when an attempted regulation on its face apparently has no effect except to grant a monopoly of the sale of certain articles to a special class under conditions which can in no manner benefit the public, such regulation cannot be sustained."

The principle that Judge Dickinson overlooks is that laid down in the case of **Michigan Public Utilities vs. Duke, 266 U. S. 570 (1925),** as well as the cases hereinabove cited, where it is held that, although a business may be within the regulatory power of the state, requirements which have no relation to the public welfare, and which would deprive a person of his business rights, cannot be sustained under the police power.

(*c*) Judge Dickinson goes on to say that in what are called the rural districts, the local pharmacist or druggist "serves many of his customers and patrons as their physician." In making such a statement Judge Dickinson seems to overlook completely—or not to realize at all—that if a pharmacist, in the rural districts or elsewhere, "serves customers and patrons as a physician" he does so in absolute violation of the laws of the state of Pennsylvania. The medical licensure act (*supra*, pp. 15-16) provides that no one except a doctor, educated, trained and licensed as such, shall act as a physician; and the registered pharmacist has no right to prescribe any medicines. His functions have to do only with the *compounding of medicines.*

After saying that the local pharmacist or druggist serves many of his customers as their physician, Judge Dickinson adds, with reference to this practice, "so general was it that the *physician* of the neighborhood was likewise the *druggist.*" (Italics ours.) Of course, although the physician was likewise a druggist he nevertheless had the right to treat his customers as a physician; and if he was also a pharmacist he had the right to fill prescriptions. It is an anomaly of the law under discussion that the physician, who prescribes the medicine, may not be the owner of a drug store or have an interest therein. That monopoly is reserved for the pharmacist, to the exclusion even of the doctor, the fountain head of the guardianship of the public health.

It seems evident that Judge Dickinson has confused the functions of druggist and physician "in the rural districts." There used to be plenty of rural districts which had no drug stores, but practically every community had access to a doctor, who carried medicines with him because of the distance to a drug store.

(*d*) Judge Dickinson goes on to say:

> "It is said that a relatively small part of the business of a drug store is the compounding of medicines and the filling of prescriptions. This is true." (R. 81.)

It is certainly true that only about 6% of the business of a drug store, whether owned by a registered pharmacist or by anyone else, is in the pre-

scription department. But this department is the heart of the whole business, is connected with the medicine and hospital departments and it is vitally necessary to that business that it have a prescription department. This is the uncontradicted evidence in the case (R. 63).

This statement of Judge Dickinson's may be an echo of the State's argument that the relatively small extent of the deprivation justifies it under the police power, which has been discussed above. It being true that a relatively small part of the business is that of filling prescriptions, the question suggests itself, why give a monopoly of the entire drug store business to the filler of prescriptions when he is concerned with only a relatively small part of the business?

(c) Judge Dickinson goes on with the following statement:

> "There is a type of drug store known as cut-rate which, perhaps, has no prescription counter at all and scarcely ever more than a nominal one. * * *" (R. 81).

It is difficult to divine the relevancy of this pronouncement.

If the Judge's remarks are directed solely to stores which have no prescription department, they fail of application to appellant, for it has prescription departments and is fighting to maintain them. If it wished merely to sell proprietary medicines, and

commonly used household drugs, it need not comply with the act of 1927 at all. It might then fall into the "cut rate" class described by the Judge. But how, in the name of reason, could its doing so, improve the public health?

We suspect, though the Judge does not say it, that what was in his mind, when he wrote the above, was this: that perhaps the legislature thought "cut rate" drug stores were more largely conducted by corporations than by registered pharmacists and that to put corporations out of the drug business would stop rate cutting. But (1) this ignores the fact that the law permits all existing corporate drug stores to continue in business; (2) it *assumes*, wholly without evidence or foundation in common experience that a corporate or non-pharmacist owner will be more likely to cut rates than a registered pharmacist or a corporation whose stock is wholly owned by such; and (3) finally it assumes it is bad for public health that, in the press of competition, some drug store shall sell a bottle of Vick's salve or of Listerine for one cent less than the other stores in town.

If "cut rate" stores, or stores without prescription departments are bad for the public, a very harmful thing is done by the Act of May 13, 1927, since it expressly authorizes the establishment of such stores without limitation and by whomsoever owned, while limiting prescription stores, so far as owned by corporations, all of whose stockholders are not pharmacists, to those now established.

(*f*) Judge Dickinson then continues (R. 81):

> "* * * * and medicines and remedies sold are so-called proprietary medicines. They are, none the less, as truly 'prescribed' by the druggist as are 'filled prescriptions' and are just as much taken upon the faith and confidence of the user in the drugs as is the medicine prescribed by a physician."

This evidences a complete misunderstanding of the situation by the learned Judge.

Not only has a pharmacist no right to "prescribe" proprietary or any other medicines, but in selling Scott's Emulsion, Cascarets, Listerine, Castoria, Vaseline, Pepsodent tooth paste and hundreds of like articles the pharmacist, or medicine clerk, for it does not require a pharmacist to sell such articles, is simply a salesman or merchant, and nothing more. Such medicines are sold by the drug store on call by the customer. It is not a part of the duties of a pharmacist to know the qualities or the efficacy of proprietary medicines nor is he held to any responsibility therefor under the drug store ownership law or the public health act. The seller is a retailer, not a physician. State *vs.* Donaldson, State *vs.* Wood, State *vs.* Childs, *supra.*

Judge Dickinson again simply confuses the functions of a physician and those of a pharmacist. The reasoning of the court in the Noel case, *supra,* and in the Wood case, *supra,* is precisely applicable to the suggestions made by Judge Dickinson and answers them fully.

(*g*) Judge Dickinson goes on to say *in words* (R. 82):

> "We, of course, recognize the force of the argument addressed to us based on the distinction between a law which forbade any one other than a skilled pharmacist to compound medicines and another law which forbids anyone other than pharmacists to have a share in the ownership of the business of a drug store."

But his decision does not show such distinction actually penetrated his consciousness in relation to the constitutionality of this so-called police regulation.

A law which interferes with individual rights, and assumes the right of interference, must directly and logically serve the public interest. The law which requires that the person who fills prescriptions must be a chemist trained in pharmaceuticals, and so registered, does serve such interest; but the law which says that such chemist must be the owner of the business serves only the interest of the pharmacist who is able to buy a drug store.

The Judge in a single phrase brushes aside the very distinction he has recognized, when he adds (R. 82):

> "Even here, however, we are unable to say that there is not a substantial relation of ownership to the public interests."

By this phrase he brushes aside all the principles and decisions we cited from this and other courts.

In effect, this is all the light he gives us on the *ratio* of his decision.

Judge Dickinson does attempt to trace a relation between ownership of the store, and the public health, by saying that the medicines must be in the store before they can be dispensed and that what is there is dictated, not by the pharmacist who hands it out to the customers, but by those who have a financial control of the business. A pharmacist owner is as much interested in the financial end of the business as any other owner and there is nothing in the drug store ownership law which places any responsibility on him or makes any requirement of him as to what is to be in the stores, or as to its quality. **Noel vs. People, State vs. Donaldson, State vs. Woods, State vs. Childs, supra.**

As suggested by the court in the *Noel case,* what is in the store is likely to be dictated by public demand rather than anything else; and the pharmacist owner is going to sell what the public requires.

(*h*) Judge Dickinson then adds this remarkable sentence (R. 82):

> "It *may be* the Legislature *thought* that a corporate owner, in purchasing drugs, *might* give a greater regard to the price than to the quality." (Italics ours.)

There is nothing in the drug store ownership law under attack which requires the pharmacist owner to give a greater regard to quality than to price. Under that law the pharmacist is perfectly free to

give a greater regard to price than to quality. If the legislature thought other classes would give a still greater regard to quality than to price, the legislature could, under Judge Dickinson's conjecture, give the exclusive right to own drug stores to doctors, lawyers, clergymen, social welfare workers or philanthropists.

Judge Dickinson does not pretend that the pharmacist owner is required to give any greater regard to quality than to price but simply says that the legislature, perhaps, *thought* the pharmacist *might* give such greater regard. If it was the purpose of the legislature to raise the quality of articles sold in drug stores, then it could, by direct legislation to that effect, have made a law which would bear on the quality of such articles. As a matter of actual fact, the question of quality and standard of drugs is dealt with in the Pure Drug Act and all persons, firms and corporations who manufacture and sell drugs and who own drug stores are amenable to its provisions. There is not a thing in the drug store ownership law which deals with the matter of quality of drugs.

But Judge Dickinson would take away the right of corporations to deal in the retail drug business by a conjecture on a subject on which he had no evidence, and as to which the plain facts are, and by statutory mandate must be, quite to the contrary.

All of the arguments made by Judge Dickinson and by the State were raised in the **Wood case** (*supra*)

in South Dakota and the court answers them conclusively. Briefs were there filed on behalf of the State Board of Pharmacy and the South Dakota Pharmaceutical Association setting up all the reasons they could think of for sustaining the law limiting the sale of proprietary medicines to pharmacists. Speaking of the brief of counsel for these associations, the court says **(215 N. W. 487, at p. 489):**

> "He points out that the provisions of the Pure Food and Drug Law prohibiting written misbranding have been sustained and says the statute in question is intended to prevent verbal misbranding. He points out that many patent medicines contain dangerous and poisonous ingredients and asks whether a purchaser should be sold a dangerous drug simply because he asks for it. He says it is necessary for the protection of the public health and to protect the public against fraud that the goods be handled by some one who understands their properties and says that the modern view and tendency is to recognize that the public are entitled to protection. * * *
>
> "It is suggested that a pharmacist, to obtain his license must be of good moral character and that would protect the public from verbal misbranding, fraud and dangerous medicines, but why restrict the sale to pharmacists only when there are many other men of good moral character? If moral character is a sufficient guarantee, the statute might require vendors to be men of good moral character, but there can be no reason for requiring them to be druggists.
>
> * * * * * * *

"Appellant suggests that the ethics of the profession would be a protection to the public health; that a pharmacist having knowledge of the harmful effect of certain drugs would voluntarily warn the public, where others would not know or care so long as a profit on a sale could be made. Perhaps knowledge might be some protection, but where the legislature has not seen fit to require that the composition and effect of such medicines be known and such knowledge used in the protection of the public health the possible benefits that may result from the knowledge are conjectural and cannot receive much consideration. It would seem to be an unreasonable exercise of the police power to limit sales to the profession without requiring anything of the profession to safeguard the public health. • • •

"We find nothing which requires druggists to warn the public against any danger in their use, or to assume any responsibility in their sale, or to do anything to protect the public in return for entrusting to them the sale of such medicines. Nor have any regulations of the Board of Pharmacy requiring anything of the druggists been called to our attention, which can be said to even tend to added security of the public in buying such medicines of druggists. If a druggist does know the ingredients he is not required to use such knowledge and need not be of any assistance; if he does not know them he cannot be of any assistance.

"Appellant says there are statutes forbidding the sale of habit-forming drugs • • •

> against the use and sale of wood and methyl alcohol * * * against the sale of adulterated and misbranded drugs * * * against the sale of pharmaceutical poisons * * * and against the sale of intoxicating liquor. But all these statutes apply with equal or greater force to laymen, subjecting them to the same penalties and liabilities. We are unable to see wherein restricting to pharmacists the unlimited and unregulated sale of patent and proprietary medicines tends to protect the public health."

Judge Dickinson goes on to talk about the liquor legislation without the slightest relevancy to this issue. The liquor legislation and its final prohibition grew out of the fact that the use and consumption of liquor for beverage purposes was regarded as a menace, and the fact that the saloon had become a nuisance. This was true of the saloons and of liquor selling whoever owned saloons.

Judge Dickinson utterly fails to point out and the evidence utterly fails to show any nuisance, any menace, any threat to the health of the public through drug stores being owned by others than pharmacists, when a registered pharmacist must, under the law, be in charge of the store and none other than a registered pharmacist may compound prescriptions. But to make any applicable analogy Judge Dickinson would have to say that he would have sustained an act—had there ever been such—which limited the ownership of saloons to barkeepers and would have barred such reputable corporations as Park &

Tilford from selling wines and liquors. Or he would have to say that it would serve the public interest if all hotel corporations were forbidden to own and operate a bar, unless all its stockholders were barkeepers.

(*c*) Judge Dickinson goes on to speak of the separation between ownership and management. He seems completely to forget that there is nothing in the drug store ownership law requiring the owner pharmacist to manage the store or to have anything to do with it. He may own it, and let anybody else in the world manage it. In the absence of any of the requirements that the owner pharmacist shall do anything with reference to the store, the possible benefits resulting from combination of ownership and management, if there are any such,—which is a practical proposition we deny,—are purely conjectural and cannot be given consideration.

Under the drug store ownership law a pharmacist may own fifty stores; certainly he could not personally manage all of them, inasmuch as one pharmacist cannot personally manage even one drug store. He would, therefore, have to rely on employed pharmacists for all of his other stores just the same as a corporation or a partnership, all of whose stockholders or members were not registered pharmacists.

What evil is to be guarded against by the combination of management and ownership referred to by Judge Dickinson or what benefit is to accrue to the public in no wise appears. The truth is that the

act in its essence simply creates a monopoly in registered pharmacists, and deprives corporations—all of whose stockholders are not registered pharmacists—of business and property rights, without benefit to the preservation of the public health, and in violation of the due process and equal protection clauses of the United States Constitution.

XI. Errors in the opinion of the Court of Common Pleas of Philadelphia County.

Contemporaneously with the institution of the present statutory proceedings in equity, George B. Evans, a Pennsylvania corporation, filed its petition in the Court of Common Pleas No. 4 of Philadelphia County in pursuance of the Pennsylvania Uniform Declaratory Judgments Act of June 18, 1923, P. L. 840, in order to determine the constitutionality of the Act of 1927. The petitioner, like the appellant, was engaged in the business of operating retail drug stores in Pennsylvania, its business being then carried on at seven retail drug stores owned by it and located in the City of Philadelphia upon premises leased by it.

The hearing was upon petition and answer; and the Act was held constitutional. This decision was rendered after that of the District Court in the present case. An appeal was taken by the George B. Evans corporation from this judgment to the Supreme Court of Pennsylvania; and was argued the latter part of January, 1928. No decision has yet been rendered by the Supreme Court of Pennsylvania. Of course, any decision by the Supreme Court of Pennsylvania in that case could not reach this Court because the action is but a declaratory judgment upon a moot question.

We think it probable that appellees will call attention to this decision. We shall, therefore, say a few words concerning the only new reasons therein stated for sustaining the Act.

(*a*) The Common Pleas Court suggest that a proprietor or owner of a drug store, who is himself a registered pharmacist, is in a better position to select other competent registered pharmacists to attend to the practical work of the pharmacy. So the law which forbids any but registered pharmacists to own, be partners in, or hold stock in a corporation which owns a drug store is justified!

1. What becomes of the Act of May 17, 1917 (P. L. 207) which governs the examination and registration of pharmacists? This gives them the legal right upon receiving their certificate of competency to compound medicines. Is the registered pharmacist owner to become a super-examining-board to revise the work of the State Board of Pharmacy? If he so constitutes himself and discharges from his employ a registered pharmacist he thinks unskilled or unworthy, what is to prevent that very same discharged pharmacist from owning and operating his own drug store, or at once becoming an employee in another drug store? Nothing. He still holds his license.

2. If the legislature wished to raise the skill and character of registered pharmacists, the way to do it was to pass a law increasing the requirements for registration. What an oblique, strained and unnecessary way to reach the situation to provide that only registered pharmacists should own or be partners or stockholders in drug stores.

3. But what of the fact that the ownership law only requires the registered pharmacist to *own* and not to *manage* his store nor to hire pharmacists or other employees? Did the court overlook the fact that he might have a manager over his pharmacist employees, who is not a registered pharmacist and who could hire the help? What becomes of the argument when this is considered?

Besides, a corporation could have a pharmacist as its employment director who could hire the pharmacist help. It would not be requisite that all the stockholders participate in the hiring of employees, and that each pharmacist employed should stand an examination by each of the pharmacist stockholders.

(*b*) This Court of Common Pleas ventures the conjecture that the Legislature thought that a proprietor, who is a registered pharmacist will supervise more intelligently and effectively the conduct of those employed in the drug store. We presume that the court refers to the pharmacy end of the drug store and not to the merchandise (non-pharmaceutical) branch of the business. But where do we find, within the four corners of the Act, any provision that requires the registered pharmacist owner to supervise the conduct of his employees? In addition, a pharmacist may have charge of but one pharmacy at the same time; what then becomes of such supervision where the registered pharmacist owns several stores as he is expressly permitted to do under the 1917 Act, and is not forbidden to do under the 1927 Supplement?

It is, of course, obvious that a pharmacist working for the corporation will supervise just as effectively as one who works for a pharmacist.

(*c*) It is suggested that the act will bring the proprietor of a drug store into direct relation with the Pharmacy Board and thus facilitate the efforts of that Board to enforce the laws covering the obligations incident to the ownership of retail drug stores. It is to be remembered that the General Pharmacy Act of Pennsylvania (Act of May 26, 1921, P. L. 1172, quoted *supra*, p. 25), requires every *drug store* to be registered, requires the registration to be renewed every year, and permits the refusal or revocation of such registration for violations of the act or violations of other law having to do with the conduct of the business of a pharmacy. It is perfectly evident, therefore, that whether the owner of a drug store be a corporation whose members are all pharmacists, or a corporation whose members are not pharmacists, such owner must obey the law and must keep in touch with and comply with the regulations made by the Pharmacy Board pursuant to law. In this aspect there is not one whit of difference between the pharmacist owner and the non-pharmacist owner.

The theory that the pharmacist owner will keep in closer touch with the State Board of Pharmacy seems to us to fail utterly when it is remembered that under the provisions of the ownership act of

May 13, 1927, here under attack, the pharmacist owner need not work in his store, need not be in his store, need not manage his store, but may live three thousand miles from it. It seems to us that the suggestion of the learned court is illusory.

G. CONCLUSION.

In conclusion, we submit that the drug store ownership law of May 13, 1927, is not a health measure; that its passage was dictated by economic considerations and not in the interest of the public health or safety; that its plain purpose is to limit the competition of corporations with individuals in the conduct of what is universally recognized as a business—the conduct of drug stores.

We submit further that the State of Pennsylvania, even if its legislature intended the Act of May 13, 1927, to be a police regulation in the interest of the public health, cannot act arbitrarily and unreasonably, cannot adopt a measure which has no real relation to the public health, on the strained and unreasonable hypothesis that by regulating something else having no real relation to the public health, to wit, the ownership of certain kinds of business, it may as a result of the process accomplish some object connected with the public health. We contend that the authorities establish the proposition that a police measure, to be sustainable, must have a direct and reasonable bearing upon the supposed evil intended to be regulated.

For the reasons, therefore, that the legislation under attack unnecessarily and improperly destroys business and property rights having no reasonable relation to the health of the community, seeks to create a monopoly, and thus deprives the appellant of the equal protection of the laws, we submit that

the decree of the court below should be reversed and a decree entered enjoining and restraining the appellees from enforcing the provisions of the Act of May 13, 1927, by forfeitures of appellant's rights and by criminal prosecutions.

Respectfully submitted,

GEORGE G. CHANDLER,
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Attorneys for Appellant.

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IN THE

Supreme Court of the United States

October Term, 1927. No. 673

LOUIS K. LIGGETT COMPANY,

Appellant,

vs.

THE HONORABLE THOMAS J. BALDRIGE, Attorney General of the Commonwealth of Pennsylvania; CHARLES C. CAMPBELL, CHARLES F. KRAMER, et al., etc., et al.,

Appellees.

Brief for Appellees

A. COUNTER STATEMENT OF THE CASE

In view of the statement of the case contained in the brief of the appellant, it is unnecessary for the appellees to present any further discussion of the facts, other than to comment upon two features of the case which the appellees consider to be of primary importance.

(a) The brief for the appellant states that the Act of May 13, 1927 (Pa. Pamph. Laws, p. 1009; West Pa. Stat. (1928) Sections 9377 a-1, 2), the constitutionality of which is the subject of controversy in this case, deals solely with the ownership of drug stores, and contains no provision respecting the compounding of drugs,

chemicals or poisons, or other regulation relative to the practice of pharmacy. The Act, it must always be remembered, is a supplement to the Act of May 17, 1917 (Pa. Pamph. Laws, p. 208; West Pa. Stat. (1920) Sections 9301 et seq.), which latter act is the principal statute now in force in Pennsylvania regulating the practice of pharmacy. The Act of 1927 must always be considered as one part only of a series of enactments regulating such practice.

(b) The record clearly shows (R. 75-77) that subsequent to May 13, 1927, the effective date of the Act of 1927, the appellant acquired a retail drug business or pharmacy in Hanover, Pennsylvania, and owned and conducted a pharmacy there; that the appellant applied for a permit to conduct said pharmacy, which permit was refused by the Pennsylvania State Board of Pharmacy; and that the appellees intend to and will proceed against the appellant for its violation of the provisions of the Act of 1927 in owning and conducting said pharmacy.

With respect, however, to the two pharmacies owned and conducted by the appellant in Philadelphia and Pottsville, Pennsylvania (Bill of Complaint, Paragraph 10 and 12, R. 4; Supplemental Bill of Complaint, Paragraph 3, R. 65), the Pennsylvania State Board of Pharmacy has at no time refused to grant permits to the appellant for the conduct of said pharmacies, nor have the appellees or any of them threatened to revoke any licenses of the appellant or to institute any proceedings, civil or criminal, against it. (Reply Affidavits re Preliminary Injunction, R. 53-59; Answer to Bill of Complaint, Paragraphs 11, 12, 19 and 20, R. 68-70; Answer to Supplemental Bill, Paragraph 4, R. 73.)

B. ARGUMENT

I. Preliminary Statement

The contention of the appellees that the Act of May 13, 1927, is constitutional is based upon the proposition that the statute was enacted by the Legislature of the Commonwealth of Pennsylvania by virtue of the police power inherent in it to legislate for the public good, health and welfare, and upon that proposition alone. The Legislature has seen fit to provide that the proper regulation of the practice of pharmacy requires that pharmacies shall be owned and conducted by duly licensed and registered pharmacists.

Such legislation represents the reasoned judgment of the State, through its legislative body, as to the necessity for such regulation, and every presumption should be indulged to sustain the validity of the statute.

II. Principles Governing Judicial Determination of Constitutionality of Statutes Enacted Under the Police Power.

It would be impertinent to argue at any length concerning the principles upon which a statute enacted in pursuance of the police power is determined to be constitutional or unconstitutional. A reference to the rule is sufficient, and no shorter or more complete statement of it can be found than that of this Court in Graves vs. Minnesota, 272 U. S. 425; 71 L. Ed. 331; 47 Sup. Ct. Rep. 122 (p. 428):

> "And the case is to be considered in the light of the principle that the state is primarily the judge of regulations required in the interest of public safety and welfare, and its police statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise the authority vested in it in the public interest. Great Northern R. Co. v. Minnesota, 246 U. S. 434,

439, 62 L. Ed. 817, 819, 38 Sup. Ct. Rep. 346; Gitlow v. New York, 268 U. S. 652, 668, 69 L. Ed. 1138, 1146, 45 Sup. Ct. Rep. 625."

III. Analysis of Existing Legislation Regulating the Practice of Pharmacy in Pennsylvania

The statutes now in force in Pennsylvania regulating the practice of pharmacy are the Act of May 17, 1917, referred to before, and the supplements thereto, the Act of May 26, 1921 (Pa. Pamph. Laws, p. 1172; West Pa. Stat. (1928) Sections 9329 a-1, et seq.), the Act of April 27, 1925 (Pa. Pamph. Laws, p. 299; West Pa. Stat. (1928) Sections 9329 b-1, et seq.) and the Act of May 13, 1927. There have been minor amendments of the Act of May 17, 1917, and there are other statutes regulating the quality and disposal of drugs and medicines, but they are not important here.

The Act of May 17, 1917, which was practically a codification of the then existing laws regulating pharmacy, with the addition of more stringent requirements, provided for the establishment of the Pennsylvania State Board of Pharmacy and the licensing of pharmacists and assistant pharmacists, and prescribed certain regulations for, in the words of its title, "the practice of pharmacy and the sale of poisons and drugs." Although no specific definition of "the practice of pharmacy" is made by the Act, a reading of its various sections, particularly Sections 13, 14 and 15 (West Pa. Stat. (1920) Sections 9323-25) will provide a definition somewhat as follows:

> *The preparing, compounding, dispensing and selling at retail of drugs, medicines, poisons or physicians' prescriptions.*

The terms "drug" and "poison" are defined in the Act and a "pharmacy" is defined as a "place where drugs, medicine, or poisons are compounded, dispensed, prepared or sold at retail."

The Act specifically recognized the right of one not a registered pharmacist to own a pharmacy if he employed a registered pharmacist to conduct it. (See particularly Section 15, West Pa. Stat. (1920) Section 9325.) A proviso to Section 13 (West Pa. Stat. (1920) Section 9323) declared that nothing in the Act should be construed to "prevent the sale or manufacture of proprietary medicines, nor prevent storekeepers from dealing in and selling commonly used household drugs when the same are offered for sale or sold in packages which have been put up ready for sale to consumers by pharmacists, manufacturing pharmacists, wholesale grocers, or wholesale druggists."

The Act of 1917 contained no provision for the licensing of pharmacies. The Act of May 26, 1921, a supplement to the Act of 1917, required the licensing of pharmacies under the supervision of the State Board of Pharmacy. This Act likewise recognized the right of one not a registered pharmacist to own a pharmacy if a registered pharmacist were employed. It was further provided that the Act should "not be construed to apply to any store or stores opened for the sale of proprietary or so-called patent medicines." (Section 1, West Pa. Stat. (1928) Section 9329 a-1).

The Act of April 27, 1925, required and regulated the registration of apprentices.

It is clear that the above Acts were not intended to and do not regulate or refer to anything but the practice of pharmacy and the operation of pharmacies, as that term is used in the Acts with a restricted meaning, that is, the compounding, preparing, dispensing and selling at retail of drugs, medicines, poisons and prescriptions. The Acts have been so applied and enforced; there is no regulation or interference with the other classes of business transacted by the store commonly known as a "drug store."

The Act of May 13, 1927 is another supplement to the Act of 1917. It is this act which is now before this

Court. Its provisions have been set forth verbatim in the brief for the appellant (p. 11) and it is not necessary to repeat them here. The purpose of the Act was to prohibit the ownership and conduct of a pharmacy, as defined in the Act of 1917, by others than licensed pharmacists. The limited meaning of the term "pharmacy" is carried over into the Act of 1927. Section 1 specifically provides that nothing therein shall be construed to prevent or affect the ownership by other than a licensed pharmacist of a store or stores wherein the sale or manufacture of drugs or medicines is limited to proprietary medicines and commonly used household drugs provided such commonly used household drugs are offered for sale or sold in packages which have been put up ready for sale to consumers by pharmacists, manufacturing pharmacists, wholesale grocers or wholesale druggists.

It is true that it is provided that, after the passage of the Act, no corporation, association or partnership shall own and conduct a pharmacy unless all the partners or members thereof are licensed pharmacists, but this is only another way of saying that pharmacies shall be owned and conducted by registered pharmacists with permission to such registered pharmacists to carry on and conduct the business of the pharmacy, in case there are more than one, either as a partnership, an association or a corporation. The Commonwealth is not interested in the form of organization under which the pharmacy is owned and conducted. It is interested in the qualifications of the persons who shall own and conduct the pharmacy under any one of the designated forms. All persons, partnerships, associations and corporations owning and conducting pharmacies at the time of the passage of the Act are permitted to continue existing pharmacies, but not to establish new ones.

Stated as briefly as possible, the purpose of the Act of 1927, when read in connection with the Acts of 1917

and 1921, was to restrict the ownership and conduct of pharmacies by which is meant the business of compounding, preparing, dispensing and selling at retail, drugs, medicines, poisons and physicians' prescriptions, as to pharmacies established after the passage of the Act, to licensed pharmacists, and at the same time permit such licensed pharmacists to own and conduct their pharmacies either individually or as partnerships, associations or corporations.

IV. The Provisions of the Act of May 13, 1927 are Reasonable and Have a Substantial Relation to the Health and Welfare of the Public.

A statute passed by a State Legislature in pursuance of the police power will not be declared unconstitutional by the courts, unless it is clearly unreasonable and arbitrary and has no substantial relation to the general well-being and welfare of the community. The action of the Legislature in passing the particular statute under attack is in itself entitled to be given great weight by the courts as indicating the necessity for the enactment.

In Graves vs. Minnesota, *supra*, in which was involved the constitutionality of a statute of Minnesota regulating the practice of dentistry, Mr. Justice Sanford, in delivering the opinion of this Court, said (p. 429):

> "By enacting the present statute the state has determined, through its legislative body, that to safeguard properly the public health it is necessary that no one be licensed to practice dentistry who does not hold a diploma from a dental college of good standing. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute. Mugler vs. Kansas, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273."

In delivering the opinion of the special Court sitting upon the application for the preliminary injunction, Judge Dickinson, in discussing the relation of the Act of 1927, to the public health and welfare, said (R. 82, 83):

> "We, of course, recognize the force of the argument addressed to us based upon the distinction between a law which forbade any one other than a skilled pharmacist to compound medicines and another law which forbade any one other than pharmacists to have a share in the ownership in the business of a drug store. Even here, however, we are unable to say that there is not a substantial relation of ownership to the public interest. The medicines must be in the store before they can be dispensed to those who come to the store for the help which medicines can afford them. What is there is dictated not by the judgment of the pharmacist who hands it out to customers but by those who have the financial control of the business. It may be the legislature thought that a corporate owner, in purchasing drugs, might give a greater regard to the price than to the quality; and if such was the thought of the legislature can this Court say it was without a valid connection with the public interests and so unreasonable as to be unlawful? How that matter affects the public interest is illustrated by another kind of business.
>
> "A number of years ago the business of selling liquor was wholly in the hands of those who sold it. Inn-keepers and Tavern-keepers stood high in the respect of their neighbors. The practice grew up of Brewers and Distillers taking over the ownership of places where intoxicating liquors were sold. The saloon when ownership and management became separated soon became a nuisance and a menace so that its abolishment was demanded, and no one at any time would wish to witness its return.
>
> "A saloon is of course not a drug store but the point is that the provisions of this Act can no more

be said to have no substantial relation to the public interests than a law would have been which, with the object of preventing nuisances, forbade any one but tavern-keepers themselves from having a financial interest in the tavern-keeping business. That financial ownership interest and managerial sense of responsibility each have a relation to a wise public policy and hence to the public interest is evidenced by the experience of the Courts in Pennsylvania upon whom was thrust the responsibility of granting liquor licenses. Every Judge who had to do with this duty was soon brought to realize the element of danger to the public conduct of taverns and saloons the moment the profits from the sales of liquor went to owners who were removed from and had no sense of the responsiblity of management. There enters into every business the two motives of a wish for profit and a sense of duty obligation towards those with whom the management deals. When these are joined the latter operates to some extent; the moment they are separated the former is in sole control. This thought deals with the relation between things which should be joined and the public policy of not permitting them to be separated. There is likewise the thought of things which should not be joined. The Act of Assembly of June 9, 1881, providing that no license to sell intoxicating liquor be granted to the owner of a place of amusement is an illustration. The relation to the public interests is of course here more direct and the recognition of it in legislation more common but in principle the two legislative acts are alike.

"Because of our inability to make the finding that the instant Act of Assembly has no substantial relation to the public interest, we cannot hold it to be unconstitutional. What opinion may be entertained of the wisdom of much of the legislation of this general character and of the motives of those who have prompted it, the Courts are not called upon to express."

Almost simultaneously with the filing of the bill in this case, George B. Evans, a Pennsylvania corporation, filed a petition under the declaratory judgment statute in Pennsylvania, making the appellees in the present case the defendants, to secure a decree as to the constitutionality of the Act of May 13, 1927. The Court of Common Pleas, No. 4, of Philadelphia County, held the act constitutional, and the case was appealed to the Supreme Court of Pennsylvania. The case has been argued in that court, but no decision has been handed down to date.

In discussing the statute as a valid exercise of the police power, the Court said, in its opinion, which is printed as Appendix A to this brief:

> "The only practical effect of the Statute upon the petitioner is to preclude it from extending its business activities by setting up additional pharmacies, unless its present stockholders dispose of their shares of stock to licensed pharmacists, or themselves procure licenses to practice pharmacy. This, however, is undoubtedly a restriction upon its business, and for that interference with its rights no compensation is provided.
>
> "The fact just pointed out, however, does not establish the invalidity of the Act of May 13, 1927.
>
> "The Commonwealth, as sovereign, may, within limits, cause, without making compensation therefor, discomfort, injury, loss or even ruin to a part of the community in the interest of the greater part. This right exists by virtue of its duty to provide for the health, the safety and the morale of its people. To enable it to perform that duty government is vested with what is known as the police power. That term, necessarily perhaps, is without an exactly formulated meaning. It was said by Mr. Justice Holmes to be an expression 'convenient to conciliate the mind to something that needs explanation.' By the exercise of this power, private property may be so regulated and

controlled by the appointed agencies of the State that its use shall not be harmful to the members of the community at large. Regulation under a proper exercise of the police power is due process of law, not confiscation, even though property is thereby taken, injured or destroyed. Under what circumstances and to what extent this power is to be exercised is, in the first instance, to be determined by the Legislature. Whether the subject which the Legislature purposes to regulate is a proper subject for regulation and, if so, whether the regulation attempted has exceeded the proper limit are questions for the courts. The latter, however, are 'concerned only with the questions whether the Statute has a recognized police purpose and whether it has a reasonable relation to the object to be attained': WHITE'S APPEAL, 287 Pa. 259; HARRIS VS. STATE BOARD OF OPTOMETRICAL EXAMINERS, 287 Pa. 531.

"The question whether the regulation of pharmacies (the word pharmacy is defined by the Act of May 17, 1917, P. L. 208, as 'a retail drug store, or any place where drugs, medicine or poisons are compounded, dispensed, prepared or sold at retail,' and is used in that sense in the Act under consideration), is within the police power of the Commonwealth is a simple one. The protection of the public health is today one of the great purposes of all civilized governments. The term 'drug' as used in the Acts just referred to 'includes all medicine and preparations recognized by the United States Pharmacopœia, the National Formulary, or the American Homeopathic Pharmacopœia, for internal or external use, and any other substance or mixture of substances, intended to be used for the cure, mitigation or prevention of disease of either man, or other animals.' Obviously, nothing touches the health of the people more closely than the conduct of drug stores or pharmacies, and control over them has long been exercised by our State authorities.

"The great question in the case is whether the effort of the Legislature to bring all retail drug stores into the ownership of licensed pharmacists has a reasonable and substantial relation to the purpose of preserving and improving the health of the people of Pennsylvania. Without such relation, interference with the rights of the petitioner and others similarly situated is not to be tolerated. It was said by our Supreme Court, in WHITE'S APPEAL, *supra*, per Kephart, J.: 'There is one matter that is quite certain—the power to thus regulate does not extend to an arbitrary, unnecessary or unreasonable intermeddling with the private ownership of property, even though such acts be labeled for the preservation of health, safety and general welfare. The exercise must have a substantial relation to the public good within the spheres held proper. It must not be from an arbitrary desire to resist the natural operation of economic laws, or for purely æsthetic considerations.'

"After much deliberation, the Court has reached the conclusion that the question last stated must be answered in the affirmative. It is true that the advantage to the public health of bringing the ownership of retail drug stores into the hands of licensed pharmacists is not at first sight as apparent as is that of requiring the compounding of medicines and the sale of drugs to be in the actual charge of those whose qualifications as pharmacists are vouched for by the license of the Pennsylvania Board of Pharmacists; but it, nevertheless, exists.

"The pharmacist in charge of a retail drug store, if its proprietor does not conduct the business himself, must always be selected by the latter. Necessarily, all pharmacists are not of the same professional skill; all are not characterized by the same fidelity to duty; all are not entitled to the same trust and confidence. The proprietor who is a licensed pharmacist, or a group of such persons,

is in a far better position to select a reliable man to attend to the practical work of the pharmacy than is the ordinary layman, or an association of men unacquainted with drugs. Also, the proprietor qualified as required by the Act can supervise more intelligently and effectively the conduct of those employed in the drug store. The purchase of supplies in the shape of drugs for sale and retail can be made by the proprietor licensed as a pharmacist with better judgment and with less danger of deception than in the case of a proprietor not so qualified. There can be little doubt that to bring the proprietor of a drug store into direct relation with the Pharmacy Board will facilitate the efforts of that body to enforce the laws governing the operation of retail drug stores. All these facts cannot but result in an improved service to the public, and thereby tend very materially to promote the health of the people. We are of the opinion that the relation between the measure proposed and the welfare of the community as a whole is reasonable and substantial. The fact that the Legislature has made an exception in favor of the present owners of drug stores who are not licensed pharmacists is not evidence against this view.

"In our opinion the Act of May 13, 1927, presents a case of the proper exercise of the police power of the Commonwealth. Its application to the petitioner and others similarly situated is not confiscatory. They are not thereby deprived of due process of law. They are not denied equal protection of the law, since all in the same class are placed upon the same footing. The statute in question does not offend against the organic law of the land, and is, therefore, valid and operative. A declaratory judgment has accordingly been entered to that effect."

An Act similar to the Act of May 13, 1927, has been in force in New York since 1923, being Section 234 of the Public Health Law, as amended by Chapter 269 of

the Laws of 1923, effective April 24, 1923. This section is as follows:

> "Every pharmacy shall be owned by a licensed pharmacist and every drug store shall be owned by a licensed druggist and no co-partnership shall own a pharmacy unless all the partners are licensed pharmacists and no co-partnerships shall own a drug store unless all the partners are licensed druggists; except that any corporation, organized and existing under the laws of the State of New York or of any other State of the United States and authorized to do business in the State of New York and empowered by its charter to own and conduct pharmacies or drug stores, and, at the time of the passage of this act, still owns and conducts a registered pharmacy or pharmacies or a registered drug store or drug stores in the State of New York, may continue to own and conduct the same and may establish and own additional pharmacies or drug stores in accordance with the provisions of this article, but any such corporation which shall not continue to own at least one of the pharmacies or drug stores theretofore owned by it or ceases to be actively engaged in the practice of pharmacy, shall not be permitted thereafter to own a pharmacy or a drug store; and except that any person not a licensed pharmacist or a licensed druggist, who at the time of passage of this act owns a registered pharmacy or a registered drug store in the State of New York, may continue to own and conduct the same in accordance with the provisions of this article."

The New York Act was before the Supreme Court of Albany County in Tucker vs. New York State Board of Pharmacy, 217 N. Y. S. 217. This case was an application for an order of mandamus against the New York State Board of Pharmacy to direct that Board to transfer the petitioner's certificate to conduct a pharmacy, which was in existence at the time of

the passage of the Act, from one location in New York to another. The Court held that the Act did not prohibit the removal of a pharmacy from one location to another and entered an order of mandamus. The constitutionality of the Act was questioned by the petitioner and the Court held with reference thereto (page 220):

> "The petitioner questions the constitutionality of the act in question. The practice of pharmacy is of such a nature as to permit its regulation by the legislature. In enacting Section 234 of the Public Health Law, I think the legislature has adopted a reasonable regulation well within its authority under the constitution."

Narcotics and liquors are part of the drugs and medicines dispensed by a pharmacy. The importance of assuring the proper enforcement of the laws governing the distribution of these articles is evident. Compliance therewith can be enforced only through the criminal statutes or through the suspension or revocation of licenses. The statutory regulations in Pennsylvania, prior to the Act of May 13, 1927, were inadequate.

The Act of May 26, 1921, provides that a license to conduct a pharmacy may be suspended or revoked upon a second or any subsequent conviction, of the owner thereof, under the laws of Pennsylvania or the United States, relative to the sale of drugs or the sale of intoxicating liquors. In many cases first convictions were secured. By the time, however, that a second conviction could be secured with reference to any particular pharmacy owner, the pharmacy had been sold and the State Board of Pharmacy was without authority to prevent the issuance of a new license to the new owner, who invariably disclaimed all knowledge of the former violation. When the owner of the pharmacy is a registered pharmacist, such an evasion is impossible.

Similarly, when a violation of a certain provision of the statutes regulating pharmacies, on the part of a particular registered pharmacist, was reported, it was discovered that the owner of the pharmacy was not a registered pharmacist, and upon complaint being made to him, the answer was that he was not a pharmacist and was not acquainted with the laws and that they had not been violated wilfully. Upon questioning the registered pharmacist in charge of the pharmacy, his answer was that he had been ordered to keep certain customs and practices and it was necessary for him to do so in order to retain his position. The difficulty of securing compliance with the statutes under these circumstances is evident.

The connection between the regulation of a profession and the ownership of the business conducted in the practice of the profession has been recognized in the practice of both law and medicine. The legislatures and courts have realized that ownership carries with it a responsibility which does much to insure the proper practice of a profession when ownership is restricted to those qualified to practice. This fact has been emphasized both by Judge Dickinson, in his opinion in the District Court, and in the opinion of the Court of Common Pleas of Philadelphia County. The legislatures in practically all states have found it necessary to prohibit, by direct or indirect legislation, corporations from entering the professions by employing lawyers or doctors to act for them.

In People vs. Title Guaranty and Trust Company, 227 N. Y. 366, 125 N. E. 666, which involved the consideration of a statute prohibiting the practice of law by a corporation, the Court said (p. 668):

> "In approaching the decision of the question, and at the outset we ought to consider what must have been the purpose of the Legislature in enacting the statute. That purpose seems obvious. There are certain fundamental requirements and

features which, according to our conception, in this state attend and surround the practice of law and rendition of truly legal services. These are the possession of sufficient knowledge and skill, the existence of a relationship of trust and confidence upon which the client may securely rely, and the power of courts to use summary proceeding, if necessary, to enforce on the part of the attorney observance of the obligations and duties growing out of this relationship. A corporation could not adequately comply with and subject itself to these requirements, if there were no penal statute. Through the employment of attorneys as its agents it might fairly meet the requirements of knowledge, skill, and ordinary legal responsibility; but it could not establish a relationship of confidence, and be subject to summary control, as an individual attorney can. MATTER OF COOPERATIVE LAW CO., 198 N. Y. 479, 92 N. E. 15, 32 L. R. A. (N. S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879."

There are numerous cases in which similar expressions have been made by the courts of the various states. Some of them are: Re COOPERATIVE LAW COMPANY, 198 N. Y. 479, 92 N. E. 15; HARMON VS. SIEGEL-COOPER COMPANY, 167 N. Y. 244, 60 N. E. 517; PEOPLE VS. DERMATOLOGICAL INSTITUTE, 192 N. Y. 454, 85 N. E. 697; WORLD'S DISPENSARY MEDICAL ASSOCIATION VS. PRINCE, 203 N. Y. 419, 96 N. E. 738; PEOPLE VS. MERCHANTS' PROTECTIVE CORPORATION, 209 Pac. 363 (Cal.); PEOPLE VS. CALIFORNIA PROTECTIVE ASSOCIATION, 244 Pac. 1089 (Cal.); NEW JERSEY COMPANY VS. SCHMERT, 122 Atlantic 307 (N. J.); HOIGEN VS. COMMONWEALTH, 142 Ky. 722, 135 S. W. 311.

In these cases, the elements of responsibility and control are emphasized as the result of requiring not only that the person who practices a profession shall be duly licensed and regulated but that the owner of the business resulting from the professional practice

shall likewise be a licensed practitioner. The substantial relation to the public welfare is evident. The arguments of the appellant are strangely reminiscent of those advanced by the opponents of the laws first passed to regulate the professions of law and medicine, to wit, that the true purpose and intent of the statutes was to create a monopoly for the licensed practitioners.

V. The Act of May 13, 1927 Does Not Deny to Appellant the Equal Protection of the Law.

It is argued that the Act of May 13, 1927 denies to the appellant the equal protection of the law, in violation of the 14th Amendment, by reason of the fact that the act became effective only as of May 13, 1927, thereby permitting all persons, partnerships or corporations owning or conducting pharmacies prior to such date to continue to own and conduct such pharmacies as were in existence at that time. Such is the effect of the proviso to Section 1 of the Act.

It has been decided in innumerable cases that statutory changes must have a beginning, and that the fixing of a date as of which the statute shall become effective and a classification of the persons upon whom it shall operate as of that date is not inconsistent with the 14th Amendment. In Sperry and Hutchinson Company vs. Rhodes, 220 U. S. 502, 55 L. Ed. 561, 31 Sup. Ct. Rep. 490, Mr. Justice Holmes, in rendering the opinion of this Court, said (p. 505):

> "But the 14th Amendment does not forbid statutes and statutory changes to have a beginning and thus to discriminate between the rights of an earlier and later time."

In Dent vs. West Virginia, 129 U. S. 114, 32 L. Ed. 623, 9 Sup. Ct. Rep. 231, this Court had under consideration a statute of the State of West Virginia relative to the practice of medicine, which authorized the con-

tinuance of such practice within the State by all practitioners who had been practising a specified number of years prior to the enactment of the statute. It was held that the exemption of certain persons who had previously been practising medicine from the provisions of the statute was not discriminatory or inconsistent with the 14th Amendment.

A statute of the State of New York regulating the practice of dentistry, which made a similar exception in the case of dentists who had been practising prior to a specified date, was involved in PEOPLE vs. GRISWOLD, 213 N. Y. 92, 106 N. E. 929. The court said, in disposing of the objection made to the exempting of certain dentists from the provisions of the Act (p. 931):

> "The appellant has no grievance from the provision that those duly licensed and registered as dentists in this State prior to the first day of August, 1895, are deemed licensed to practice. It is the rule for such acts to preserve the status of those lawfully engaged in the pursuit regulated."

Similar exemptions have been upheld in STATE vs. CREDITOR, 44 Kansas 565, 24 Pac. 346; *Ex Parte* WHITLEY, 144 Cal. 167, 77 Pac. 879; and HODGEN vs. COMMONWEALTH, *supra*.

VI. THE REGULATION OF A PROFESSION INVOLVES PRINCIPLES DIFFERENT FROM THOSE APPLICABLE TO THE REGULATION OF AN ORDINARY TRADE OR OCCUPATION

The appellant has argued at great length that the Act of May 13, 1927, cannot be sustained as an exercise of the police power because there is no reasonable or logical connection between the object in view and the means adopted to accomplish the object. Numerous cases are cited in support of the various propositions

advanced in support of this contention, which is fundamental to the appellant's case. It is true that in these cases the regulatory statute attacked was declared unconstitutional, but these cases deal with regulations affecting ordinary trades and occupations or the conduct of businesses. KEYSTONE GROCERY AND TEA COMPANY VS. WILLIAM A. HUSTER, No. 10922. In Equity, Circuit Court of Allegheny County, Maryland, and GREAT ATLANTIC AND PACIFIC TEA COMPANY VS. DOUGHTON, Sup. Ct. of Waite County, North Carolina (Appellant's Brief, p. 39) deals with statutes which attempted to regulate chain stores as such. CITY OF DANVILLE VS. QUAKER MAID, INC., 211 Ky. 677, 278 S. W. 98, (Appellant's Brief, p. 42) involved a law taxing cash and carry stores. STATE VS. DONALDSON, 41 Minn. 74; NOEL VS. PEOPLE 187 Ill. 587; SADLER VS. PEOPLE 188 Ill. 243; STATE OF SOUTH DAKOTA VS. WOOD, 215, N. W. 487; STATE VS. CHILES, 257 Pac. 366, (Appellant's Brief, p. 50) concern statutes which attempted to regulate the sale of proprietary and patent medicines. PEOPLE VS. RISCH, 197 N. Y. 143 (Appellant's Brief p. 55) deals with a statute regulating undertaking.

The determination of the constitutionality of the the statutes reviewed in these cases involves questions which are different from those under consideration in the present case. The regulation of the practice of law, medicine, dentistry and pharmacy is not the same as the regulation of an undertaker, a merchandising business and other similar occupations and businesses. The practice of a profession is not a business open to all, but a personal right in the nature of a franchise conferred by the State by virtue of which the State claims the right to determine the conditions under which the franchise may be exercised.

RE COOPERATIVE LAW CO., 198 N. Y., 479, 92 N. E. 15, involved an application by a corporation claiming to have been lawfully organized with power to carry

on the business of practicing law for approval of its existence and the continuance of its business for the purposes designated. A certificate of approval which had been previously granted was vacated and from the order vacating such certificate an appeal was taken to the Court of Appeals of New York. In reviewing the order vacating the certificate of approval, the Court said (p. 16):

> "* * * The practice of law is not a business open to all, but a personal right, limited to a few persons of good moral character, with special qualifications ascertained and certified after a long course of study, both general and professional, and a thorough examination by a state board appointed for the purpose. The right to practice law is in the nature of a franchise from the state conferred only for merit. It cannot be assigned or inherited, but must be earned by hard study and good conduct. It is attested by a certificate of the Supreme Court, and is protected by registration. No one can practice law unless he has taken an oath of office and has become an officer of the court, subject to its discipline, liable to punishment for contempt in violating his duties as such, and to suspension or removal. It is not a lawful business except for members of the bar who have complied with all the conditions required by statute and the rules of the courts. As these conditions cannot be performed by a corporation, it follows that the practice of law is not a lawful business for a corporation to engage in. As it cannot practice law directly, it cannot indirectly by employing competent lawyers to practice for it, as that would be an evasion which the law will not tolerate. 'Quando aliquid prohibetur ex directo, prohibetur et per obliquium.' Co. Lit. 223."

The distinction between cases involving the constitutionality of statutes regulating the practice of a profession such as medicine or pharmacy and statutes

regulating the pursuit of an ordinary trade or occupation was recognized clearly in the case of GRAVES vs. MINNESOTA, *supra*. The opinion of this Court in that case concludes (p. 429):

> "This conclusion is in harmony with the decisions in other state courts involving the constitutional validity of statutes regulating the practice of medicine or dentistry which contain similar or analogous provisions, as well as with the earlier Minnesota decisions. * * * * And it is not in conflict with the decisions in SMITH vs. TEXAS, 233 U. S. 630, 58 L. ed. 1129, L. R. A. 1915D, 677, 34 Sup. Ct. Rep. 681, Ann. Cas. 1915D, 420, and STATE vs. WALKER, 48 Wash. 8, 92, Pac. 775, 15 Ann. Cas. 257, on which the plaintiff in error relies, which dealt with statutes attaching unreasonable and arbitrary requirements to the pursuit of the employments or trades of locomotive engineers and barbers. These manifestly involve very different considerations from those relating to such professions as dentistry requiring a high degree of scientific learning."

VII. CONCLUSION

In conclusion, we beg to submit that the Act of May 13, 1927, is an enactment of the Legislature of the Commonwealth of Pennsylvania, regulating the practice of pharmacy therein, that it was so enacted in pursuance of the police power inherent in that Commonwealth, that it is neither unreasonable nor arbitrary and that it has a substantial relation to the public health, safety and welfare.

The Act does not deprive the appellant of its business and property rights without due process of law, nor does it deny to appellant the equal protection of the law. We contend that it is subject to no constitutional or other objections and should be held to be a

proper exercise of the police power and a constitutional enactment.

We therefore respectfully request that the decree of the Court below be affirmed.

PAUL C. WAGNER,
Deputy Attorney General;
THOS. J. BALDRIGE,
Attorney General
For the Commonwealth of
Pennsylvania,
Attorney for Appellees.

"APPENDIX A"

George B. Evans, *A Corporation* vs. The Honorable Thomas J. Baldrige, Et Al.	In the Court of Common Pleas No. 4 of Philadelphia County. March Term, 1927. No. 19197.

OPINION

Per Curiam:

The petition prays the Court to declare that a certain Statute enacted by the General Assembly of the Commonwealth of Pennsylvania, approved by the Governor May 13, 1927 (P. L. 1009), insofar as the same affects the petitioner's right to establish or own pharmacies or drug stores in addition to those now owned by it, and to conduct its business therein in accordance with the Act of May 17, 1917 (P. L. 208), is unconstitutional and invalid.

Upon the presentation of this petition a rule was granted on the Attorney General of the Commonwealth, the members of the Pennsylvania Board of Pharmacy and the District Attorney of the County of Philadelphia, to show cause why the judgment prayed for should not be entered. All of the respondents appeared and answered.

The matter was argued on petition and answers. While certain of the petitioner's averments are denied, the basic facts of the case are undisputed. Upon them the question of the validity of the Statute attacked by the petitioner may satisfactorily be disposed of.

The Act referred to in the petition is entitled

A Supplement

To the Act approved the seventeenth day of May one thousand nine hundred and seventeen (Pamphlet

Laws, two hundred and eight), entitled "An Act to regulate the practice of pharmacy and sale of poisons and drugs and providing penalties for the violation thereof, defining the words 'drugs' and 'poison' and providing for the appointment of a board which shall have in charge the enforcement of said law and the power to make rules and regulations for the enforcement of said law and providing for the purchase of samples of drugs for determining their quality, strength and purity," regulating the ownership of pharmacies and drug stores and providing penalties.

By its general terms this Act forbids the carrying on or operation of any pharmacy or drug store unless its proprietor is either

(a) A licensed pharmacist,

(b) A co-partnership, each member of which is a licensed pharmacist, or

(c) A corporation, all of whose members are licensed pharmacists.

This prohibition does not apply to the case of a store where the only drugs or medicines sold are proprietary medicines, or commonly used household goods sold or offered for sale in packages put up, ready for sale to customers, by pharmacists, manufacturing pharmacists, wholesale grocers or wholesale druggists.

The Act provides that it shall not prevent the carrying on of a pharmacy or drug store by its present proprietor although such proprietor may not come within any of the categories above enumerated.

The proprietor of a pharmacy, whose present qualifications do not comply with the general requirements of the Act, shall not, however, establish, own or conduct another or additional pharmacy; and no such proprietor who shall cease to own a pharmacy shall thereafter become again the owner of such establishment, without having obtained a license to practice pharmacy.

In the event of the death of an unlicensed individual

pharmacist who is now the owner of a drug store, the business may be continued therein by his or her personal representative for such a period as may be necessary for the settlement of the estate.

Suitable provision is made for the enforcement of compliance with the terms of the Act by the imposition of fines. The terms "drugs," "drug store," "pharmacy" and "licensed pharmacist" are defined by the Act to which this Act is a Supplement.

The underlying purpose of the Statute seems to be to bring about the ownership of pharmacies or drug stores by licensed pharmacists or by associations, incorporated or unincorporated, of licensed pharmacists. It recognizes the right of ownership now existing in such establishments already controlled by persons not licensed as pharmacists, but prohibits the acquisition of further rights of a similar character.

George B. Evans, the petitioner, is a corporation. Its capital is $1,100,000. Its stock is divided among approximately one hundred and twenty-five persons, of whom, however, only its president and approximately half a dozen others happen to be licensed pharmacists. The company is engaged in the retail drug business, which is carried on through seven retail drug stores or pharmacies. Each of these is under the supervision of a duly licensed pharmacist, whose duties are confined to it alone. It is claimed that the corporation intends to increase the number of its drug stores, and that the removal of some of those that it now operates, from the leased properties which they presently occupy may upon the expiration of the leases on which such properties are held become necessary.

The petitioner asserts that its business is interfered with by the Act of 1927, above referred to, because that Statute prevents it from establishing additional drug stores and renders it impossible to move its existing drug stores to new locations, thus subjecting it to unreasonable exactions on the part of its landlords. It

is contended that this, in effect, deprives the petitioner of its property without due process of law, and that it is thereby denied the equal protection of the law. It is urged that the Statute so far as it affects the business of the petitioner, offends against the first section of the Fourteenth Amendment of the Constitution of the United States and is, therefore, invalid and of no effect so far as concerns the petitioner.

It may be observed, in passing, that the complaint that the Act under consideration places the petitioner and other parties similarly situated at the absolute mercy of their landlords when their current leases expire is without foundation. True it is that it forbids the present owners of drug stores who are not licensed as pharmacists to establish, own or conduct "other or additional pharmacies or drug stores"; but it was manifestly not intended by the Legislature to leave them *adscriptos glebae*. The use of the word "or" in the phrase quoted is not disjunctive, but conjunctive. It introduces another word intended to explain that which precedes it. By the word "additional" the meaning of the word "other" is limited and clarified. All that the phrase means is that under no circumstances shall the number of the drug stores of a proprietor not qualified under the general terms of the Statute be increased. A drug store now owned by such a proprietor may be moved to a new location without compliance with the general rule that the owner of a drug store must be a licensed pharmacist, or an association, corporate or unincorporated, composed exclusively of licensed pharmacists.

The only practical effect of the Statute upon the petitioner is to preclude it from extending its business activities by setting up additional pharmacies, unless its present stockholders dispose of their shares of stock to licensed pharmacists, or themselves procure licenses to practice pharmacy. This, however, is undoubtedly a restriction upon its business, and for that

interference with its rights no compensation is provided.

The fact just pointed out, however, does not establish the invalidity of the Act of May 13, 1927.

The Commonwealth, as sovereign, may, within limits, cause, without making compensation therefor, discomfort, injury, loss or even ruin to a part of the community in the interest of the greater part. This right exists by virtue of its duty to provide for the health, the safety and the morale of its people. To enable it to perform that duty government is vested with what is known as the police power. That term, necessarily perhaps, is without an exactly formulated meaning. It was said by Mr. Justice Holmes to be an expression "convenient to conciliate the mind to something that needs explanation." By the exercise of this power, private property may be so regulated and controlled by the appointed agencies of the State that its use shall not be harmful to the members of the community at large. Regulation under a proper exercise of the police power is due process of law, not confiscation, even though property is thereby taken, injured or destroyed. Under what circumstances and to what extent this power is to be exercised is, in the first instance, to be determined by the Legislature. Whether the subject which the Legislature purposes to regulate is a proper subject for regulation and, if so, whether the regulation attempted has exceeded the proper limit are questions for the courts. The latter, however, are "concerned only with the questions whether the Statute has a recognized police purpose and whether it has a reasonable relation to the object to be attained": White's Appeal, 287 Pa. 259; Harris vs. State Board of Optometrical Examiners, 287 Pa. 531.

The question whether the regulation of pharmacies (the word pharmacy is defined by the Act of May 17, 1917, P. L. 208, as "a retail drug store, or any place where drugs, medicine or poisons are compounded,

dispensed, prepared or sold at retail," and is used in that sense in the Act under consideration), is within the police power of the Commonwealth is a simple one. The protection of the public health is today one of the great purposes of all civilized governments. The term "drug" as used in the Acts just referred to "includes all medicine and preparations recognized by the United States Pharmacopœia, the National Formulary, or the American Homeopathic Pharmacopœia, for internal or external use, and any other substance or mixture of substances, intended to be used for the cure, mitigation or prevention of disease of either man, or other animals." Obviously, nothing touches the health of the people more closely than the conduct of drug stores or pharmacies, and control over them has long been exercised by our State authorities.

The great question in the case is whether the effort of the Legislature to bring all retail drug stores into the ownership of licensed pharmacists has a reasonable and substantial relation to the purpose of preserving and improving the health of the people of Pennsylvania. Without such relation, interference with the rights of the petitioner and others similarly situated is not to be tolerated. It was said by our Supreme Court, in WHITE'S APPEAL, *supra*, per KEPHART, J.: "There is one matter that is quite certain—the power to thus regulate does not extend to an arbitrary, unnecessary or unreasonable intermeddling with the private ownership of property, even though such acts be labeled for the preservation of health, safety and general welfare. The exercise must have a substantial relation to the public good within the spheres held proper. It must not be from an arbitrary desire to resist the natural operation of economic laws, or for purely æsthetic considerations."

After much deliberation, the Court has reached the conclusion that the question last stated must be answered in the affirmative. It is true that the advantage

to the public health of bringing the ownership of retail drug stores into the hands of licensed pharmacists is not at first sight as apparent as is that of requiring the compounding of medicines and the sale of drugs to be in the actual charge of those whose qualifications as pharmacists are vouched for by the license of the Pennsylvania Board of Pharmacists; but it, nevertheless, exists.

The pharmacist in charge of a retail drug store, if its proprietor does not conduct the business himself, must always be selected by the latter. Necessarily, all pharmacists are not of the same professional skill; all are not characterized by the same fidelity to duty; all are not entitled to the same trust and confidence. The proprietor who is a licensed pharmacist, or a group of such persons, is in a far better position to select a reliable man to attend to the practical work of the pharmacy than is the ordinary layman, or an association of men unacquainted with drugs. Also, the proprietor qualified as required by the Act can supervise more intelligently and effectively the conduct of those employed in the drug store. The purchase of supplies in the shape of drugs for sale and retail can be made by the proprietor licensed as a pharmacist with better judgment and with less danger of deception than in the case of a proprietor not so qualified. There can be little doubt that to bring the proprietor of a drug store into direct relation with the Pharmacy Board will facilitate the efforts of that body to enforce the laws governing the operation of retail drug stores. All these facts cannot but result in an improved service to the public, and thereby tend very materially to promote the health of the people. We are of the opinion that the relation between the measure proposed and the welfare of the community as a whole is reasonable and substantial. The fact that the Legislature has made an exception in favor of the present owners of

drug stores who are not licensed pharmacists is not evidence against this view.

In our opinion the Act of May 13, 1927, presents a case of the proper exercise of the police power of the Commonwealth. Its application to the petitioner and others similarly situated is not confiscatory. They are not thereby deprived of due process of law. They are not denied equal protection of the law, since all in the same class are placed upon the same footing. The statute in question does not offend against the organic law of the land, and is, therefore, valid and operative. A declaratory judgment has accordingly been entered to that effect.

Office Supreme Court, U. S.
FILED
OCT 8 1928
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 14

LOUIS K. LIGGETT COMPANY,

Appellant,

v.

THE HONORABLE THOMAS J. BALDRIGE, ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, CHARLES C. CAMPBELL, CHARLES F. KRAMER, et al., etc., et al.,

Respondents.

NOTICE OF MOTION, PETITION AND BRIEF FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE.

SOL M. STROOCK,
Amicus Curiae.

PRESS OF FREMONT FAYNE, NEW YORK CITY

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Supreme Court of the United States

OCTOBER TERM, 1927.

LOUIS K. LIGGETT COMPANY, Appellant, v. THE HONORABLE THOMAS J. BALDRIGE, ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, CHARLES C. CAMPBELL, CHARLES F. KRAMER, et al., etc., et al., Respondents.	No. 673.

Notice of Motion for Leave to File a Brief as Amicus Curiae.

Sir:

PLEASE TAKE NOTICE that the undersigned acting as counsel for a party interested in the questions involved in the above entitled suit will move this Court at the opening of the Court on the 8th day of October, 1928, or as soon thereafter as counsel can be heard for leave to file a brief as amicus curiae, and for such other and further relief as may be proper.

Dated, New York, October 4th, 1928.

Yours, etc.,

SOL M. STROOCK,
Amicus Curiae.

To

GEORGE G. CHANDLER, Esq., ROY M. STROOCK, Esq.,
and OWEN J. ROBERTS, Esq.,
Attorneys for Appellant.

Honorable THOMAS J. BALDRIGE,
Attorney General and
Honorable PAUL C. WAGNER,
Deputy Attorney General,
Attorneys for Respondents.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1927.

LOUIS K. LIGGETT COMPANY,
Appellant,

v.

THE HONORABLE THOMAS J. BALDRIGE, ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, CHARLES C. CAMPBELL, CHARLES F. KRAMER, et al., etc., et al.,
Respondents.

Petition for Leave to File Brief as Amicus Curiae.

The undersigned respectfully petitions this Honorable Court for leave to file a brief as *amicus curiae* in the above entitled matter.

Your petitioner applies as counsel for Whelan Drug Co., Inc., a New York corporation.

The Company was incorporated under the name of United Retail Chemists' Corporation and qualified and was licensed to carry on the drug business in the State of Pennsylvania on May 14, 1920. At the present time, it operates stores in Easton, Pa., and Chester, Pa., conducting a retail drug business including the compounding of prescriptions, all in accordance with the laws of the State of Pennsylvania. These stores were in operation prior to the passage of the Amendment of May 13, 1927, to the Act approved May 17, 1917, the constitutionality of which amendment has been attacked in these proceedings.

Definite plans have been made by Whelan Drug Co., Inc., for the establishment of new stores in Pottsville, Lebanon, Lancaster and Newcastle, Pennsylvania.

The sole stockholder of Whelan Drug Co., Inc., is not a registered pharmacist. The corporation has twelve directors, three of whom are pharmacists registered in states other than Pennsylvania. Of the seven corporate officers, three are pharmacists registered in states other than Pennsylvania.

Notice of this application having been served upon counsel for the respective parties in the above entitled suit, this motion is now respectfully submitted for the consideration and action of the Court.

Dated, New York, October 4th, 1928.

SOL M. STROOCK,
Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1927.

LOUIS K. LIGGETT COMPANY,
Appellant,

v.

THE HONORABLE THOMAS J. BALDRIGE, ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, CHARLES C. CAMPBELL, CHARLES F. KRAMER, et al., etc., et al.,
Respondents.

BRIEF SUBMITTED ON BEHALF OF WHELAN DRUG CO., INC.

Statement.

Whelan Drug Co., Inc., files this brief *amicus curiae* in support of the position of the appellant that the Act of May 13, 1927, amending the Act of May 17, 1917, enacted by the Pennsylvania Legislature, is unconstitutional. Whelan Drug Co., Inc. (formerly known as United Retail Chemists' Corporation), is vitally interested in this contention. It is a New York corporation licensed since 1920 to carry on the drug and pharmacy business in the State of Pennsylvania. Prior to the passage of the Amendment of 1927, it operated two stores in Pennsylvania. Definite plans have been made for the establishment of four new and additional stores. The sole stockholder of this corporation is not a registered pharmacist.

I.

The Act requires only corporate stockholders to be registered pharmacists.

The Amendatory Act of May 13, 1927 (set forth in full on page 10 of Transcript of Record) applies to corporations, associations and copartnerships,

> "unless all the partners or members thereof are licensed pharmacists."

It is obvious that the word "partners" can apply only to associations and copartnerships. One must assume that the Legislature of Pennsylvania used the term in its technical sense. On the other hand, "members" refers to the stockholders of a corporation.

Fletcher on Corporations (1917) (Sec. 3953) states:

> "Most of the modern business corporations are stock corporations,—that is, corporations having a capital stock divided into shares. *Persons who own these shares are the members of the corporation.*" (Italics ours.)

The Pennsylvania Corporation Law refers at times to "stockholders" and at other times to "members" of the corporation. The practically interchangeable use indicates that "members" means "stockholders," or the composite body constituting a non-stock corporation.

The Pennsylvania Act of 1874, Section 5, as amended by the Laws of 1891, page 61, Section 5, and Laws of 1927, Act No. 417, approved May 6, 1927, supports this conclusion. It provides, among other things:

> "The number of directors or trustees shall not be less than three; one of them shall be chosen president by the directors, or by the *members*, of the corporation, as the by-laws shall direct. The *members* of said

corporation may at a meeting to be called for that purpose, determine, fix or change the number of directors or trustees that shall thereafter govern its affairs * * *."

Directors are not required by statute to be stockholders (Laws 1919, p. 67).

The statute directs that the business of every corporation created thereunder shall be conducted by the president, board of directors or trustees, a secretary or clerk, a treasurer and such other officers as the corporation authorizes (Act of 1874, Section 5, as amended by the Laws of 1891, p. 61, Section 5, and Laws of 1927, Act 417, approved May 6, 1927). By virtue of the same provisions, the directors are chosen by the "*stockholders or members*" and the directors may also choose the president of the company who must be a director.

It is therefore apparent that the affairs of a corporation organized under the laws of the State of Pennsylvania may be managed in their entirety by a group of persons who are not stockholders.

It is a fair assumption that the Pennsylvania legislature in passing the Amendment of May 13, 1927, did so in the light of the Pennsylvania Corporation Law. These statutes are fundamentally akin to the corporation laws in the remaining States of the United States.

II.

Corporate business is within the protection of the Federal Constitution.

Both Louis K. Liggett Company and Whelan Drug Co., Inc., are corporations organized under the laws of states other than Pennsylvania.

All corporations, both domestic and foreign, are entitled to the benefits and protection of the Fourteenth Amend-

ment and other applicable portions of the Federal Constitution.

Power Mfg. Co. v. *Saunders* (1927), 274 U. S. 490;
Kentucky Finance Corporation v. *Paramount Auto Exchange Corporation* (1922), 262 U. S. 544;
Leecraft v. *Texas Company* (1922), 281 Fed. 918 (Writ of Error dismissed, 262 U. S. 732).

The business of an individual or corporation is a property right, and it is in the protection of this right that the Amendatory Act of May 13, 1927, is here assailed.

Truax v. *Corrigan* (1921), 257 U. S. 312;
Duplex Printing Press Co. v. *Deering* (1921), 254 U. S. 443.

We have no quarrel with the right of a state legislature to enact reasonable regulations of business in general and particularly in respect to the compounding and selling of drugs and medicines. Under the police power, various such statutes have been enacted by practically all the states of the Union, and Pennsylvania has sought to protect the citizens of her State by the Act of May 17th, 1917 (P. L. 208; Pa. Stats. 9301 ff), containing a general revision of the Pharmacy Law; by the Act of May 26th, 1921 (P. L. 1172; Pa. Stats. 1924 Supp. 9329 aff.), requiring that every drug store be registered by the State Board of Pharmacy and that the business of each registered drug store be under the supervision of a registered pharmacist; by the Pure Drug Law of May 8, 1909 (P. L. 470; Pa. Stats. 9377 ff), forbidding the adulteration or misbranding of drugs and prescribing a recognized standard of purity; and other measures of like character.

It is our contention that the statute in question is invalid for the following reasons:

(a) It serves no public purpose, but constitutes an arbitrary interference with constitutional rights;

(b) It is not what it purports to be, namely, a health ordinance, but rather an unreasonable regulation of trade and deprives the parties within its purview of their property without due process of law; and

(c) It impairs unreasonably freedom of contract.

III.

The statute is an arbitrary interference with constitutional rights.

When analyzed, the statute merely requires that persons who have no part in the active conduct of the corporation be registered pharmacists, whereas those persons who are in daily contact with the business and its direction may be of any training, business or profession.

While it is true that the legislature is accorded broad discretionary powers in determining the need for legislation and its probable effect, yet such discretion is subject to the ever scrutinizing eye of the courts charged with the duty of preserving constitutional rights.

As this Court stated in *Dobbins* v. *Los Angeles* (1904), 195 U. S. 223, at page 235:

> "It may be admitted that every intendment is to be made in favor of the lawfulness of the exercise of municipal power, making regulations to promote the public health and safety, and that it is not the province of courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community. But, notwithstanding this general rule of the law, it is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances and even legislative enactments undertaking to regulate useful

> business enterprises, are subject to investigtaion in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether under the guise of enforcing police regulations there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property."

And in *Lawton* v. *Steele* (1893), 152 U. S. 133, 137:

> "In other words, its (referring to the legislature) determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

The label which the State of Pennsylvania chose to place upon the statutes is not binding upon this Court.

> "It is true, no doubt, that neither a state legislature nor a state constitution can interfere arbitrarily with private business or transactions, and that the mere fact that an enactment purports to be for the protection of public safety, health or morals is not conclusive upon the Courts."
>
> Holmes, J., in *Otis* v. *Parker* (1903), 187 U. S. 606, 608.

IV.

The statute unreasonably regulates legitimate business.

Even were the statute inspired by the best of motives, reasonable means must be employed to attain the end. If the means are not so fashioned, the Court may delve beneath the avowed motives of the legislature. This has been done many times in the past.

The Supreme Court of Illinois in holding invalid a statute prohibiting provisions to be exposed for sale where

dry goods, clothing, jewelry and drugs were sold (*City of Chicago* v. *Netcher* [1899], 183 Ill. 104, 112), stated:

> "It is plain that its object is not to protect the health, morals or safety of the public, or to accomplish any object falling within the police power. It is a mere attempt to deny a property right to a particular class in the community where all other members of the community are left to enjoy it."

A Pennsylvania statute forbade the use of shoddy in mattresses. This Court in *Weaver* v. *Palmer Bros. Co.* (1926), 270 U. S. 402, enjoined the enforcement of the Act on the ground that it was a purely arbitrary means of controlling an otherwise "legitimate and useful" business.

Even granting that the prevention of the sale of short weight loaves of bread was within the purview of legislative enactment, it was held in *Burns Baking Co.* v. *Bryan* (1924), 264 U. S. 504, that an act establishing a standard weight loaf of bread with provision for a maximum weight was unconstitutional, as—

> "• • • unnecessary, unreasonable and arbitrary • • •. But a State may not, under the guise of protecting the public, arbitrarily interfere with private business, or prohibit lawful occupations, or impose unreasonable and unnecessary restraints upon them • • •" (pp. 512-513).

California attempted to require private carriers to obtain a permit and register as public carriers under the guise of regulation of the use of the public highways. This Court in *Frost* v. *Railroad Commission of the State of California* (1926), 271 U. S. 583, discerned that the primary purpose was to protect the business of common carriers by controlling competitive conditions, rather than protection or conservation of the highways, and declared the act invalid.

Yick Wo v. *Hopkins* (1886), 118 U. S. 356, involved the validity of an ordinance of the City of San Francisco, making it unlawful for any person to establish, maintain or carry on a laundry within the corporate limits of the City and County of San Francisco, without having first obtained the consent of the Board of Supervisors, unless the same be located in a building constructed either of brick or stone. The ordinance was denounced as unreasonable and arbitrary.

There has been no contention in this litigation that the appellant, or any other pharmacy conducted by a corporation of which the members are not registered pharmacists, has sold inferior drugs or in any other manner impaired or endangered the public health. It is likewise apparent that the business of such companies has been conducted strictly in accordance with governing provisions of the Pennsylvania statutes. The drugs dispensed have been equal in purity to the standards prescribed. Each store conducted by such corporations has been and is under the personal supervision of a registered pharmacist. There is nothing in the Amendment of May 13, 1927, which places, or purports to place, upon the owner any additional duty; it does no more than limit without reasonable basis the class of persons who may own pharmacies.

Recent statutes in Arizona and South Dakota, permitting only licensed pharmacists to sell patent medicines, have been declared unconstitutional.

> *State* v. *Childs* (Ariz. 1927), 257 Pac. 366;
> *State* v. *Wood* (So. Dak. 1927), 215 N. W. 487.

While it is true that these statutes are more limited in character than the one here involved, yet the reasoning of the Court in each instance upholds our position.

In the Arizona case, the Court stated (p. 370):

> "We do not wish to be understood that we hold the power of the Legislature to legislate in regard to the

sale of drugs, medicines, or poisons is denied. On the contrary, we think all reasonable provisions protecting the health and safety of the public by regulating the prescribing, compounding, and dispensing of such articles are highly commendable and should be encouraged, *but when an attempted regulation on its face apparently has no effect except to grant a monopoly of the sale of certain articles to a special class under conditions which can in no manner benefit the public, such regulation cannot be sustained.*" (Italics ours.)

The South Dakota Court based its result upon the following (p. 489):

> "Unless the sale of such medicines by pharmacists is regulated, then requiring such sales to be made by pharmacists does not regulate their sale, but merely gives to a class the exclusive right to make unregulated sales of such medicines. *Unlimited and unregulated sales by pharmacists may be just as extensive and quite as harmful as unlimited sales by others* • • •. *It would seem to be an unreasonable exercise of the police power to limit sales to the profession, without requiring anything of the profession to safeguard the public.*" (Italics ours.)

The "chain store" with extensive branches is entitled to no more consideration than the smallest pharmacy conducted by an individual, but when the statutes does nothing more than limit without apparent reason the persons who may engage in this business

> "• • • it is the right, as well as the duty, of the Court, to pronounce it invalid, as in excess of legislative power and an arbitrary and unwarranted interference with the right of the citizen to pursue any lawful occupation."
>
> *State* v. *Donaldson* (1889), 41 Minn. 74.

The Act here involved goes far beyond the general line of statutes regulating the sale of drugs which have been upheld by the Courts.

The statute in *State Board of Pharmacy* v. *Matthews* (1910), 197 N. Y. 353, is typical. It required that sales of drugs, medicines and poisons be made by a licensed pharmacist, or in the presence or under the supervision of the licensed pharmacist or druggist. Such a statute is a salutary measure and already covered by the Pennsylvania enactments previously referred to, which are now in effect and complied with by the various chain drug stores operating in the State.

V.

Freedom of contract is impaired.

The appellant, Louis K. Liggett Co., and Whelan Drug Co., Inc., have valuable property rights in the business which they are now conducting in the State of Pennsylvania, and shareholders have a free and unrestricted sale of their stock.

The 1927 Amendment in its practical effect severely restricts the sale of a store or its business by one of the banned corporations, and brings within narrow confines the class of persons to whom stockholders may sell or transfer their stock. Similar restrictions have on past occasions been condemned by the courts.

Coppage v. *Kansas* (1914), 236 U. S. 1, held unconstitutional a statute making it criminal for an employer to require as a condition of employment that the employee refrain from becoming or remaining a member of any labor organization while so employed.

Fairmont Creamery Co. v. *State of Minnesota* (1927), 274 U. S. 1, overturned a statute prohibiting creameries to purchase cream at higher prices in one locality than in another after allowance for the difference in cost of transportation.

An ordinance forbidding colored persons to occupy

houses in blocks where the greater number of houses were occupied by white persons was held to be an unreasonable restraint upon the power of alienation on contract.

Buchanan v. *Warley* (1917), 245 U. S. 60.

Respectfully submitted,

SOL M. STROOCK,
Amicus Curiae.

Office Supreme Court,
FILED
OCT 8 1928

Supreme Court of the United States

OCTOBER TERM, 1927

No. 34

LOUIS K. LIGGETT COMPANY, Appellant,

v.

THE HONORABLE THOMAS J. BALDRIGE, Attorney General of the Commonwealth of Pennsylvania; CHARLES C. CAMPBELL, CHARLES F. KRAMER, ET AL., ETC., ET AL.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

May it Please the Court:

The undersigned, as counsel for May Drug Company, a Pennsylvania corporation, respectfully move this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae*.

CHARLES H. SACHS,
LOUIS CAPLAN,
Counsel for May Drug Company
as Amicus Curiae.

328 Frick Building,
Pittsburgh, Pa.

SMITH BROS. CO. INC., LAW PRINTERS, 209-213 GRANT STREET, PITTSBURGH, PA.

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Supreme Court of the United States

OCTOBER TERM, 1927

NO. 673 34

LOUIS K. LIGGETT COMPANY, Appellant,

v.

THE HONORABLE THOMAS J. BALDRIGE, Attorney General of the Commonwealth of Pennsylvania; CHARLES C. CAMPBELL, CHARLES F. KRAMER, ET AL., ETC., ET AL.

BRIEF OF MAY DRUG COMPANY AS AMICUS CURIAE.

I.

Preliminary Statement.

This brief is filed on behalf of the May Drug Company, a Pennsylvania corporation, which is interested in the questions involved in this appeal, although not a party to it. This company has been engaged for twenty-two years and upwards in operating retail drug stores in the city of Pittsburgh, Pennsylvania, and in the territory adjacent thereto. It owns seventeen stores, and has one building devoted to warehouse and office purposes. Each of its stores is under the management and personal supervision of a duly registered phramacist, each of said pharmacists having personal supervision of not more than one store.

This corporation is affected by the statute in question in precisely the same manner as Louis K. Liggett Com-

pany, appellant, and its rights will be determined by the decision of this case. Its capital stock is not owned by pharmacists licensed by the State of Pennsylvania, and if the statute here involved is sustained as valid, this company will be unable to extend and further develop its business, and the value of its assets will be greatly impaired.

II.

Argument.

THE STATUTE BEFORE THE COURT IN THIS CASE IS A TRADE AND NOT A POLICE REGULATION; IS UNREASONABLE AND ARBITRARY, AND VIOLATES THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The possibilities of legislation of the character of the Act of Assembly of the Commonwealth of Pennsylvania, approved May 13, 1927, P. L. 1009, "regulating the ownership of pharmacies and drug stores", are tremendous. If such laws are valid, then a method has been found for preventing corporations from engaging in many lines of business, perhaps all lines of business, in which they are at present engaged.

Let us take, for illustration, the baking business. At present, it is carried on by many corporations with large capital. The first step to put corporations out of that business would be to enact a law forbidding any person from following the trade of a baker, from mixing batches of dough, or performing any of the operations of a baker, unless he had obtained a license from a board established by law to pass upon his skill and fitness. It could not be questioned that such legislation would have a substantial relation to the public health, and would be valid. The next step would be to pass an act similar to the one here in-

volved, declaring that all bakeries shall be owned by licensed bakers. The fact that the statute may, like this one, countenance ownership by corporations, all of the members of which are licensed bakers, does not detract from the fact that the ownership of bakeries is forbidden to anyone but licensed bakers. For what sort of a corporation would it be, if the ownership of its stock was limited to licensed bakers? Would it be possible to have corporations with capital stock running into millions of dollars, if such a comparatively small class of people could acquire its stock? Those who profess to be lovers of the "proletariat", might consider this not an undesirable effect, but that is not the policy of the law.

From the baking business we go to the grocery business. It is certainly as important to the health of the citizen that he should be safeguarded against putting any deleterious food substances in his stomach, as medicinal preparations. An argument may be made by those who would like to drive corporations out of the grocery business, that no one should be permitted to sell, vend or dispose of food stuffs, unless he was licensed by the state as a grocer, after he had shown that he possessed a knowledge of the principles of wholesome foods. If a sufficient number of people interested in getting such legislation through would get together, they might conceivably apply sufficient pressure in one way or another on a legislature to pass such an act. The courts might be constrained to hold such an enactment to be a valid exercise of the police power. "The state has wide discretion in selecting things for regulation," said the Supreme Court of the United States, in *Weaver v. Palmer Bros Co.*, 270 U. S. 402, the Pennsylvania mattress case, although it held, in that case, that it had exceeded even that wide discretion. Then would follow a statute, like this one, prohibiting the *ownership* of grocery stores by any one but "licensed grocers."

We have valid statutes prohibiting any one except licensed mechanics from following the *trade* of plumbing. It might not be a far stretch to consider that the building of automobiles had involved in it public interest and safety, and that to protect the lives and health of the people from unsafe and improperly built automobiles, no mechanic should be allowed to build, or work on, an automobile, unless he obtained a license. That accomplished, another act would be passed prohibiting any but licensed mechanics from owning, in whole or in part, an automobile factory.

So we can go on forbidding to corporations most lines of *business*, which they are at present engaged in carrying on, and which they have developed to a point of perfection and magnitude which individuals, acting separately, or in small groups, would not have been able to attain. It could be defended just as logically as this act can be defended.

That we are not indulging in groundless fears that this kind of legislation, if permitted to stand, would be made use of to create monopolies in many lines of business, is evident from what has happened. In the state of Washington, a statute was enacted forbidding any person other than a licensed dentist from owning a dental office. In the state of New York, a somewhat similar law was passed relating to the undertaking business, and another one with reference to the plumbing business. They were all declared invalid: *State v. Brown*, 37 Wash. 97; *People v. Ringe*, 197 N. Y. 143; *Schnaier v. Navarre Hotel Co.*, 182 N. Y. 83.

Of course, this Act does not *expressly* prohibit corporate ownership, but its effect to accomplish this is just as plain as if it came out openly and honestly under that banner. What sort of corporations would we have, if they were limited to such special and privileged classes? All the benefits that we have received during the past hundred years through the development and growth of corporations, the

power to produce, economically and at low prices, articles that would otherwise be within the reach of the wealthy few, would disappear. But thirty years ago, a coach was the possession of only the wealthy. Today, an automobile, which is so far superior to the coach that it has rendered the latter obsolete, and a curiosity, is owned by millions of workingmen. To sustain this class of legislation, would be turning back the course of progress hundreds of years.

This statute is a puny attempt to go back to industrial methods that we have outgrown, and to which we cannot be made to return by legislative fiats. It is as futile to attempt to nullify the progress we have made, as it would be to declare, by act of legislature, that we must go back to candle light, and horse drawn vehicles.

This is not a police, but a trade regulation, and while plausibility may suggest some far fetched excuse for contending that the public health is concerned in who owns some of the shares in a drug store where a prescription is compounded by a man duly licensed for that purpose, it cannot be denied by those who have a regard for the truth, that the real purpose in back of this legislation is to forbid the carrying on the business of a drug store by corporations, and to grant an exclusive monopoly thereof to apothecaries. It is true that they did not attempt the bold thing of putting the corporations, *at present in it*, out of business entirely. They put in an exception allowing corporations now lawfully conducting stores to continue to conduct these same stores, but not to operate new ones. First, they want to put the present act on a safe basis, to have the court declare it constitutional, and then they will pass an act forbidding any corporation from carrying on that business, no matter how long they have been in it, and thus destroy them.

And, logically, why should they not pass such an act later? Is the public health less likely to be impaired by

the Liggett Company, in its operation of drug store A, which it has conducted in Philadelphia for 20 years, let us say, than of drug store B, which it opens in 1928? The distinction is without justification or merit. With all the wisdom that is supposed to be back of a legislature's determinations, as embodied in its official enactments, there is no reason in holding one to be proper, and therefore allowed to continue, and the other improper, and not permitted to be started.

Here is where corporations who have large sums invested in this business find themselves. If it were not for the gracious exception in the following language: "Except that any corporation • • • which *at* the time of the passage of this act still owns and conducts a registered pharmacy or pharmacies or drug store or drug stores • • • may continue to own and conduct the same, but no other or additional pharmacies or drug stores shall be established, owned or conducted by such corporation • • • unless all the members, etc.", they would suffer a confiscation, a destruction of a lawful business, in which considerable capital, millions of dollars, are invested, a business which was started under the protection of the law, and which was carried on by persons scientifically trained and legally authorized to do so, because of a matter which has no relation whatever to the public health or interest, namely, the *ownership of its stock*. And yet, if the principle enunciated by the Supreme Court of Pennsylvania in the case of *Com. v. Zacharias*, 181 Pa. 126, (altho, it was not necessary to a decision of that case), is still logical, and holds good, the exception is bad.

There are other exceptions in the act which are bad, the proviso upon a proviso:

"PROVIDED That nothing in this section shall be construed to prevent or affect the ownership by other

> than a registered pharmacist of a store or stores wherein the sale or manufacture of drugs or medicines is limited to proprietary medicines and commonly used household drugs PROVIDED, such commonly used household drugs are offered for sale or sold in packages which have been put up ready for sale to consumers by pharmacists, manufacturing pharmacists, wholesale grocers or wholesale druggists." (Capitals ours).

In other words, if a "wholesale grocer" puts whatever "drugs or medicines" it pleased in a package, it is lawful for anybody to own the store in which it was sold, whether the wholesale grocer or his employes, were qualified to put up medicines or not, but, if a company of bakers, printers, or carpenters put up these original package goods, then, it takes a registered pharmacist to own the store in which it is sold. We cannot discover any reason for the license to sell medicines to the public, put up by wholesale, but not retail, grocers, if it contained in a closed package, unless it be one on a par with the reason given by the man who made the claim that bologna sausage is the cleanest food. Asked why, he replied: "Because it is tied at both ends".

There is, manifestly, no more reason for the Act, as a whole, than for its exceptions.

This class of legislation, which consists of *ipse dixits* like "Every pharmacy or drug store shall be owned only by a licensed pharmacist" is so new and untried that it is interesting to speculate on what would probably be its effect on those responsible for its enactment, if it should be sustained as valid. Let us suppose that in the flush of victory, a number of licensed pharmacists band together, obtain a charter, and start to operate a drug store or drug stores. One or all of them die, and their estates attempt to sell their stock certificates,—the stores themselves they

cannot sell. Their market is limited, firstly, because apothecaries, druggists, may not be as a class, men with ready money, and, secondly, because those that have some money have lived long enough, under the operation of the law, to see how the estates of their deceased friends have been caught, pinched, by the very act they thought was going to do so much for them, and are therefore unwilling to increase their investments in property of such doubtful value. They have enough in the store or stores which they already own. They cannot build them up for their families, an ambition which leads many men to expand their businesses, and to make plans for their conduct, even after their death. It is a new kind of property which they have created in their desire for a monopoly, something for which there is no precedent in the economic system of any civilization or people, property which is not inheritable as such, and which must be thrown on the market and sold, if a buyer can be found for it.

The difficulties and impossibilities of such a statute are manifest. Suppose that one of the stockholders in a corporation, all of the members of which are licensed pharmacists, should transfer his stock to one who is not a licensed pharmacist, or should, for personal misconduct, lose his license, what will be the plight of the corporation, and its innocent stockholders? Shall they, law abiding one day, be transmuted into criminals the next day, because of something for which they are not responsible? Must the corporation go out of business? And what is the nature of its capital stock? May it be reached on an execution, or, is the money invested in such stock safe from levy by creditors? If it may be sold on an execution, what rights does the purchaser get?

What fanciful reason can be given for such a statute? The stockholders of a corporation who are licensed phar-

macists are not obliged by the law to participate in the management or supervision of the stores. They may be absentee owners, showing interest only in the question of whether the store is making money, and whether they are likely to get dividends on their stock. The interests of the public are already carefully safeguarded by the provisions of the Act of May 17, 1917, P. L. 208, which make it unlawful to sell drugs, medicines or poisons, at retail or compound physicians prescriptions, except in compliance with that act, and which forbids any one but a registered pharmacist to have charge of a pharmacy, and does not permit a registered pharmacist to have personal supervision of more than one pharmacy at the same time. The law provides for the quality and strength of medicinal preparations made by manufacturing chemists, so that the quality of the drugs available for purchase by retail druggists is settled. What, then, is left on which the solicitude of the legislature may operate? The general notions of honesty and fair dealing of the owners? But what rational ground is there for the assumption that the standards of honesty possessed by registered pharmacists are higher than those of other citizens, so that it would probably be injurious to public welfare to allow citizens generally to own stock in corporations carrying on the drug business?

From every standpoint, from a consideration of everybody's interest, this act is, and should be declared, unconstitutional.

Respectfully submitted,

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